Supreme Court, U.S.
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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; JAMES PRICE, Superintendent of State Correctional Institution at Greene; RAYMOND J. COLLERAN, Superintendent of State Correctional Insitution at Waymart; COMMONWEALTH OF PENNSYLVANIA,
Petitioners,

v.

GEORGE E. BANKS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the 1996 amendments to the federal habeas statute abrogate the rule that a federal habeas court *must* address the rule against retroactivity, as described by Teague v. Lane, 489 U.S. 288 (1988), so that federal courts now must *refuse* to consider retroactivity where the state courts rejected the underlying claim on other grounds?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit.)

2. Does this Court's decision in Mills v. Maryland, 486 U.S. 367 (1988), constitute a new rule of law that, pursuant to Teague, cannot be applied retroactively to award sentencing relief to a prisoner whose conviction became final before the new rule was announced?

(Not reached by the United States Court of Appeals for the Third Circuit, although the panel offered its view that Mills would probably apply to older convictions.)

3. If Mills applies retroactively, where a state supreme court has rejected a Mills challenge because neither the trial court's instructions nor the verdict form advised the jury that it must be unanimous as to the existence of mitigating circumstances and, to the contrary, made clear that unanimity was required only to find aggravating circumstances and to impose a sentence of death, is that decision contrary to, or an unreasonable application of, this Court's precedent?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit.)

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ORDERS AND OPINIONS BELOW

The October 31, 2001 judgment and opinion of the United States Court of Appeals for the Third Circuit, reversing the order of the district court, is reported at 271 F.3d 527 (3d Cir.), and is reprinted in the Appendix at App. 3-49. The December 11, 2001, order of the Third Circuit denying the state's Motion for Rehearing *En Banc* is reprinted in the Appendix at App. 1-2. The August 18, 1999, order of the district court denying the petition for writ of habeas corpus is reported at 63 F. Supp.2d 525 (M.D. Pa.), and is reprinted in the Appendix at App. 58-105.

STATEMENT OF JURISDICTION

This is a federal habeas corpus proceeding. Petitioner seeks review of the order of the United States Court of Appeals of the Third Circuit dated October 31, 2001, reversing the order of the district court, and granting the writ as to sentencing. The court denied *en banc* rehearing on December 11, 2001 (Becker, C.J., dissenting). This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. § 2254(d), which provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; ...

STATEMENT OF THE CASE

On September 25, 1982, George Banks murdered thirteen people in an armed rampage in Wilkes-Barre, Pennsylvania. Seven of his victims were children, including five of his own. Banks admitted the killings in several statements to police. At trial, he took the stand and admitted shooting most of the victims; however, Banks claimed that the police had framed him for the *other* murders, which the police themselves had supposedly committed.

On June 21, 1983, a Luzerne County jury rejected Banks' fanciful conspiracy theory and convicted him on twelve counts of first-degree murder, and one count each of third-degree murder, attempted murder, aggravated assault, recklessly endangering another person, robbery, and theft of a motor vehicle. Following the penalty phase of the trial, the same jury convicted Banks to death on each of the twelve counts of first-degree murder. He received an additional aggregate sentence of twenty-five to fifty years in prison on the other convictions.

While the conviction and sentencing marked the end of Banks' trial, it was only the beginning of post-conviction litigation that has now lasted almost twenty years. The Pennsylvania Supreme Court first affirmed Banks' conviction on direct appeal in 1987, see Commonwealth v. Banks, 521 A.2d 1 (Pa. 1987), and this Court denied *certiorari*, see Banks v. Pennsylvania, 484 U.S. 873 (1987). Banks then sought collateral relief under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541 *et seq*. One of the claims raised in this first PCRA petition is at issue here: Banks claimed for the first time that his sentencing instructions violated Mills v. Maryland, 486 U.S. 367 (1988). The PCRA trial court rejected this argument, as well as Banks' other claims. This denial of collateral relief was affirmed by the Pennsylvania Supreme Court. Commonwealth v. Banks, 656 A.2d 467 (1995). This Court again denied *certiorari*. Banks v. Pennsylvania, 516 U.S. 835 (1995).

Banks' first federal habeas petition was dismissed without prejudice so that Banks could pursue additional state remedies. Banks v. Horn, 126 F.3d 206 (3d Cir. 1997). The state courts, however, found that Banks' second PCRA petition was time-barred under the 1996 amendments to the PCRA. Commonwealth v. Banks, 726 A.2d 374 (Pa. 1999). Governor Thomas Ridge signed a death warrant -- Banks' second -- on March 9, 1999; petitioner returned once again to federal court. This time, the district court denied the petition on the merits. Banks v. Horn, 63 F. Supp.2d 525 (M.D. Pa. 1999), App. 58-105. The court denied reconsideration on September 16, 1999. App. 50-57.

On appeal, the Third Circuit reversed and granted Banks a new sentencing hearing based on the Mills claim. 271 F.3d 527 (3d Cir. 2001), App. 3. The panel refused to consider whether Mills could properly be applied to older convictions like this one, because the state court had not addressed the retroactivity issue. App. 28-32.

The Commonwealth timely sought *en banc* rehearing of the panel's decision. The Pennsylvania Attorney General filed an *amicus* brief in support of rehearing, pointing out the potentially widespread impact of the panel's decision. According to the Attorney General, dozens of older Pennsylvania capital cases had included arguably similar instructions; all of these would potentially be subject to attack on the basis of the panel's decision. Brief of Amicus Curiae in Support of Petition for Rehearing, App. 123-24.

On December 11, 2001, the Third Circuit denied the Commonwealth's motion for *en banc* review. Chief Judge Edward R. Becker dissented from the denial of rehearing. App. 2.

REASONS FOR GRANTING THE WRIT

I. AEDPA did not change this Court's longstanding rule that federal courts hearing a habeas petition *must* address retroactivity as a threshold matter where the state properly raises it; this Court should grant *certiorari* to reaffirm this principle.

The Third Circuit granted sentencing relief to Banks based on an alleged violation of Mills v. Maryland, 486 U.S. 367 (1988). The problem is, Banks' judgment became final in

1986, before Mills was decided. The state argued to the district court, App. 106, and to the Third Circuit, App. 113, that Mills announced a new rule of constitutional law and should not be applied under Teague v. Lane, 489 U.S. 288 (1989) (announcing rule of non-retroactivity). Nevertheless, the panel refused to even *consider* the question of retroactivity -- because the state courts had not first addressed the issue.

This decision is not only clearly wrong; it is potentially far-reaching. Under the Third Circuit's novel theory, the 1996 amendments to the federal habeas statute have drastically changed the legal landscape -- federal courts cannot now deny relief for any reason not already explicitly considered by the state courts. App. 28-32. Here, the court used this new theory to avoid a retroactivity ruling. This is itself important, because retroactivity is often addressed for the first time in federal habeas -- for example, state courts often find some alternative ground for denying relief rather than venturing into a complicated Teague analysis. More fundamentally, there is no obvious limit to this new waiver theory: the Third Circuit's reasoning could just as easily be used to exclude consideration of *any* argument that had not first been considered in state court.

In Caspari v. Bohlen, 510 U.S. 383 (1994), this Court stated a simple rule: "[I]f the State [argues] that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply Teague before considering the merits of the claim." Id. at 389 (emphasis in original). This mandatory directive is consistent with the many other cases in which this Court stressed that retroactivity must be addressed as a threshold matter when raised by the state. See, e.g. ,Schiro v. Farley, 510 U.S. 222, 228 (1994) (Teague is "first step" in federal habeas case); Graham v. Collins, 506

U.S. 461, 466-67 (1993) (retroactivity presents "threshold matter"); Collins v. Youngblood, 497 U.S. 37, 40-41 (1990) (retroactivity is "threshold question").

This "threshold" treatment is made necessary by the nature of the Teague doctrine. The nonretroactivity principle is not a garden-variety defense; it serves the public interest against endless relitigation of final criminal convictions, and acts as an independent restraint on the scope of federal habeas review. See Caspari, 510 U.S. at 389 ("[t]he nonretroactivity principle *prevents* a federal court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final"; court may invoke it *sua sponte*) (emphasis in original). As this Court explained in Teague, retroactive application of new constitutional rules "seriously undermines the principle of finality which is essential to our criminal justice system," 489 U.S. at 309, and intrudes upon the states' criminal processes to a degree unmatched elsewhere in the constitutional system, id. at 310. Furthermore, the Teague rule must be applied as a threshold question as a matter of fairness, because "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." 489 U.S. at 300.

In light of Teague's fundamental importance as a limiting principle, it is not surprising that the application of the Teague rule in federal court has never depended on its having first been considered in state court. See Glock v. Singletary, 65 F.3d 878, 889 (11th Cir. 1995) (state court's choice to retroactively apply new law does not moot Teague issue; so long as state court denies relief, federal habeas court must engage in Teague analysis in order to give that denial

due respect), cert. denied, 519 U.S. 888 (1996). Indeed, in Teague itself, the state courts had not taken up the issue. See People v. Teague, 439 N.E.2d 1066, 1069-71 (Ill. App. 1982). In the later cases where this Court has applied Teague, the same has generally been true -- the state courts did not address retroactivity. See, e.g., Caspari, 510 U.S. 383 (state court decision at 743 S.W.2d 425); Stringer v. Black, 503 U.S. 222 (1992) (state court decision at 454 So.2d 468); Goeke v. Branch, 514 U.S. 115 (1995) (state court decision at 811 S.W.2d 11).

The Third Circuit could cite no cases that share its new approach, which apparently has not been adopted by any other federal court. In the absence of case support, the panel relied solely on the language of 28 U.S.C. 2254(d). As this Court is well aware, that provision was changed by the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). AEDPA now prohibits the grant of habeas relief "with respect to any claim that was adjudicated on the merits in State court" unless the adjudication of that claim resulted in a decision that was contrary to, or an unreasonable application of, "clearly established federal law" as described by this Court's precedent. 28 U.S.C. § 2254(d). The Third Circuit interpreted this new standard of review to drastically alter the scope of review as well: In the panel's words, "[t]o determine whether the Pennsylvania Supreme Court's ruling ... was contrary to, or involved an unreasonable application of, Supreme Court precedent, we do not need to undertake any retroactivity analysis, because, notably, the Pennsylvania Supreme Court undertook none." App. 29-30.

In other words, according to the Third Circuit, the Caspari/Teague "threshold" rule has been overruled by AEDPA. The panel would require that the arguments be

frozen at the moment of the state court's decision; if the state court has adjudicated the claim, the panel concludes, the only appropriate subject of federal habeas review is the reasoning employed by the state court. If the state court's decision fails to measure up in some way, that is the end of the inquiry -- the federal habeas court cannot consider anything else, and the writ *must be granted*.

This cannot be right. There may be a host of reasons for rejecting a particular claim -- the state court need not list them all. Indeed, it is not possible, as a result of limited judicial resources, an ever-expanding docket, and the complexity of many legal issues, for courts to explore *every* reason for denying relief in *every* case. But under the Third Circuit's interpretation of AEDPA, a state court's silence on an alternative argument amounts to *waiver* of that argument for the duration of habeas review. Thus, habeas relief can issue even if there are *clear* and even *undisputed* reasons for rejecting the claim not mentioned by the state court. This head-in-the-sand result is absolutely incompatible with the purpose of AEDPA, which was designed to *promote* the finality of state court judgments. Clearly, AEDPA was not intended, nor should it be interpreted, to create new ways for state courts inadvertently to forfeit finality protections that were always available under pre-AEDPA law.

The Third Circuit's approach is based on a plain mis-reading of the habeas statute. Section 2254(d) imposes a *limitation* on the power of federal courts to grant habeas relief to state prisoners: the writ "*shall not*" be granted unless the state court's decision was unreasonable, or contrary to this Court's precedent. 28 U.S.C. § 2254(d) (emphasis added). The panel, however, has interpreted § 2254(d) to do just the opposite -- to *expand* the opportunities for federal courts to

intrude on state court decisionmaking, to reach many cases where Teague used to prohibit the application of new rules.

The limiting language of § 2254(d), however, cannot sensibly be interpreted this way. If the petitioner demonstrates that the state court's decision was unreasonable, the "shall not" language of § 2254(d) does not somehow convert into a mandatory command that the writ *must* issue. Rather, there is still room for the prosecution to assert other defenses, or point out other reasons why relief should be denied -- just as law enforcement authorities were able to do before AEDPA was passed. See Schiro v. Farley, 510 U.S. 222, 228-29 (1994) ("the State, as respondent, is entitled to rely on any legal argument in support of the judgment below.").

This is also the only way to reconcile § 2254(d) with the rest of the habeas statute. In particular, the panel's decision conflicts with the limitation expressed in § 2241:

> (c) The writ of habeas corpus shall not extend to a prisoner unless --
>
> * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2241(c)(3). The universe of cases where habeas relief is appropriate obviously cannot be expanded beyond this maximum. But the Third Circuit's reading of § 2254(d) would do just that. That is, according to the panel, the federal habeas court *must* order habeas relief even if the Constitution does not command it, so long as state court simply did not discuss the dispositive counter-argument.

But § 2241 cannot be so blithely interpreted away. It does not offend the Constitution, or any other federal law, to incarcerate a prisoner like Banks, whose claim for relief is based on a new rule of law that should not be applied retroactively. Therefore, he is not entitled to habeas relief.

The panel also suggests an entirely different, and even more broad, reason for its refusal to apply Teague. According to the Third Circuit, Teague has been *replaced* by § 2254(d)'s "clearly established" language. App. 27; see 28 U.S.C. § 2254(d)(1) (prohibiting relief except where the state court decision is contrary to, or an unreasonable application of, "*clearly established* federal law") (emphasis added). The panel held that the "clearly established" phrase not only describes the kind of legal rule against which state decisions must be measured, but also that it serves a temporal function -- that is, the phrase commands federal courts to analyze only the federal law existing *at the time of the state court decision.* App. 27. That is true, as far as it goes -- it would make no sense to inquire whether a state court's decision is reasonable with respect to federal law that was not in existence at the time. Apparently, however, the court also believes that the "clearly established" phrase serves as the new habeas retroactivity rule, because it prevents new rules from reaching backward in time.

While this may sound innocuous, actually it would work a sea-change in retroactivity law. Under Teague, the critical date for determining whether a rule should be applied to an old conviction is the end of direct appeal: if a rule is announced after that date, then it will not apply except in rare circumstances. Under the Third Circuit's "clearly established" theory, however, the new critical date is *whenever the state courts rejected the claim*, whether that be

direct appeal or collateral review. It does not seem to matter *why* the state court rejected the claim -- whether on the merits, or on retroactivity grounds, or for some other reason. So long as the legal rule was "clearly established" on the date the claim was rejected, then it is fair game -- there is apparently no retroactivity bar to the rule's application.

Once again, the Third Circuit has adopted a strange view of AEDPA that conflicts with settled law -- and once again, it misses the point. Section 2254(d) describes the standard which petitioners must meet in order to gain relief. That provision does *not* describe every situation where the standard of review should not be applied at all because relief must be denied for other reasons. There are other doctrines that establish categories of cases where relief cannot issue. For example, petitioners are not entitled to relief on procedurally defaulted claims, or on the basis of an untimely habeas petition, or where the prisoner is not in custody, *or where the petitioner seeks to retroactively apply a new rule of constitutional law and the prosecution has timely objected on those grounds*. Section 2254(d) did not change these categories; Teague is still good law.

The Third Circuit's new interpretation of § 2254(d), and its refusal to apply Teague, also specifically conflicts with this Court's retroactivity jurisprudence; it leaves open the possibility that similarly situated defendants will be treated differently. For example, the state supreme court might reject a Mills claim on retroactivity grounds in one case, while choosing an alternative ground in another.[1]

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[1] This is not merely a theoretical possibility. The Pennsylvania Supreme Court has in other cases noted its

(continued ...)

According to the Third Circuit, the federal courts could not apply the same legal test to these defendants, even if they presented identical Mills claims based on the same jury instruction to every state and federal court. But this is exactly the same problem that led this Court to conclude that retroactivity must be decided as a threshold matter.

The Third Circuit's approach is thus inconsistent with this Court's retroactivity jurisprudence as well as the language and purpose of AEDPA. But the panel did not merely hold that retroactivity analysis was precluded by a waiver rule hidden in AEDPA's standard of review; curiously, the panel also asserted that Teague serves no purpose where the state court has addressed the underlying claim. 271 F.3d at 543. Of course, this is beside the point -- whatever the Third Circuit believes the *purpose* of Teague to be, the *holding* of Teague (as well as Caspari) expressly requires that retroactivity be addressed as a threshold matter. In any event, the panel's statement of Teague's purpose is woefully incomplete. The rule of non-retroactivity does not

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view that Mills should not be applied retroactively. See Commonwealth v. Chester, 733 A.2d 1242, 1256 n.14 (Pa. 1999) (criticizes Third Circuit for failing to apply Teague rule to bar retroactive application of Mills); Commonwealth v. Cross , 726 A.2d 333, 337-38 & n.4 (Pa. 1999) (Mills should not apply retroactively). Under the Third Circuit's analysis, those defendants may well be treated differently from this one; that is, if the retroactive application of Mills is eventually found to be barred under Teague, then those petitioners will not get relief, and this one will.

merely ensure that federal courts will never consider a constitutional theory not addressed by the state courts. The non-retroactivity principle is an independent restraint; it ensures "evenhanded justice." Teague, 489 U.S. at 300. Its operation also guarantees that old convictions are not continually open for reassessment and attack. It ultimately provides closure -- not merely to state criminal process, but to victims and their families as well.

This is one of the strangest aspects of the Third Circuit's analysis: while it professes to protect state interests, it assigns no value whatsoever to state *law enforcement* interests. That is, even if the prosecution raises the non-retroactivity principle at every opportunity, under the Third Circuit's reasoning, retroactivity protection is waived if the state courts simply choose to reject the claim on some other ground. Thus, the people's interest in finality, as expressed by their representatives in state law enforcement, has been entirely overlooked.

The Teague non-retroactivity rule is a threshold matter that must be addressed if the prosecution properly raises it in federal court. This Court should grant *certiorari* to affirm that this principle remains unchanged.

II. The Circuits have split over the question whether Mills announced a new rule of law which, pursuant to this Court's decision in *Teague*, cannot be retroactively applied; this Court should grant *certiorari* to resolve the retroactivity issue.

There has been a great deal of disagreement over whether Mills applies retroactively. The Circuits that have addressed the question are split. Compare Miller v.

Lockhart, 65 F.3d 676, 685-86 (8th Cir. 1995) (Mills announced new rule of law that, per Teague, could not be applied retroactively on collateral review), and Cordova v. Collins, 953 F.2d 167, 173 (5th Cir.) (same), cert. denied, 502 U.S. 1067 (1992), with Gall v. Parker, 231 F.3d 265, 322 (6th Cir. 2000) (Mills did not announce new rule of constitutional law so as to bar retroactive application under Teague), cert. denied, 121 S. Ct. 2577 (2001), and Williams v. Dixon, 961 F.2d 448, 456 (4th Cir. 1992) (although Mills announced new rule, it qualifies under second Teague exception permitting retroactive application), cert. denied, 506 U.S. 991 (1992). Similarly, state courts have come to differing conclusions on the Mills/Teague issue. Compare Commonwealth v. Cross, 726 A.2d 333, 338 n.4 (Pa. 1999) (Mills not retroactive under Teague) with State v. Zuniga, 444 S.E.2d 443, 446-47 (N.C. 1994) (Mills properly applied retroactively).

This issue has thoroughly befuddled the Third Circuit. First, in Zettlemoyer v. Fulcomer, 923 F.2d 284, 306 n.19 (3d Cir.), cert. denied, 502 U.S. 902 (1991), the court assumed that Mills would be retroactively applied because this Court had not held otherwise, and went on to reject a Mills challenge very similar to the one in this case. The Zettlemoyer dissent opined that the disputed instructions would indeed violate Mills, but suggested that Mills would *not* be retroactively applied. Id. at 316-17 n.3. Several years later, in Frey v. Fulcomer, 132 F.3d 916 (1997), cert. denied, 524 U.S. 911 (1998), the Third Circuit addressed another Mills claim involving yet another similar set of instructions. This time, the court noted that the Mills/Teague issue presented a "close and difficult question upon which the circuits are split," but did not address the issue because the state had not raised it. Id. at 920 n.4. (The court in Frey ultimately granted relief on the Mills claim, despite its

similarity to the charge in Zettlemoyer.) Finally, in this case, the Third Circuit observed in *dicta* that Mills could probably be retroactively applied. App. 30-31 n.16.

The Third Circuit's confusion, and the split among various circuits, demonstrates the need for this Court's intervention. The importance of this issue is especially well-demonstrated here, because the instructions were not unique -- they were taken from the then-standard Pennsylvania jury charge. Similar instructions were used in many other Pennsylvania capital cases, and the Pennsylvania Supreme Court consistently upheld them in the face of Mills challenges. See, e.g., Commonwealth v. Cross, 726 A.2d 333, 337-38 (Pa. 1999), Commonwealth v. Albrecht, 720 A.2d 693, 706 (Pa. 1998), and cases cited therein. If Mills is retroactive, and if the instructions here violate Mills, then many of these older cases will be revisited. Indeed, in his *amicus* brief supporting the Petition for Rehearing below, the Pennsylvania Attorney General estimated that the decision below may impact dozens of Pennsylvania capital sentences. App. 124. That prediction is coming true: In the short time since the Third Circuit issued its decision, at least two courts in the Eastern District of Pennsylvania have relied on its holding and vacated death sentences on the same grounds. Peterkin v. Horn, 179 F. Supp.2d 518, 522 (E.D. Pa. 2002); Abu-Jamal v. Horn, 2001 WL 1609690, *114-126 (E.D. Pa. 2001).

The Mills/Teague inquiry depends, first, on whether Mills announced a new rule of law, or whether its holding was "dictated by precedent" existing at the time that Banks' conviction became final. Teague, 489 U.S. at 301. Under this standard, the Mills rule was new -- its holding was by no means a foregone conclusion in 1987, and indeed it marked a

significant leap from prior precedent. This Court first held in Lockett v. Ohio, 438 U.S. 586, 604 (1978), that a capital sentencer must be allowed to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Although Lockett was a plurality opinion, this Court applied its holding several times over the next few years. In each case, the Court reversed a death sentence where the sentencer had been *entirely precluded* from considering a category of appropriate mitigating evidence. First, in Eddings v. Oklahoma, 455 U.S. 104, 114 (1982), the Court invalidated a death sentence where the sentencing judge had stated that he could not consider the defendants' family background in mitigation "as a matter of law." Similarly, in Skipper v. South Carolina, 476 U.S. 1, 3 (1986), the jury had not been permitted to consider any evidence concerning the defendant's adjustment to prison. Finally, in Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987), neither the advisory jury nor the sentencing judge was permitted to consider evidence supporting non-statutory mitigating circumstances; thus, the evidence of defendant's family background was ignored.

That was where the law stood at the time that Banks' conviction became final. Mills, decided the following year, addressed a different problem -- the question of unanimity. There was no dispute that the jurors in Mills could hear and consider any evidence of mitigation that the defendant chose to present. See Md. Ann. Code, Art. 27, §413(g) (allowing sentencer to find as mitigation "[a]ny other facts which the jury or the court ... finds as mitigating circumstances in the case"), quoted in Mills, 486 U.S. at 370 n.1. If, after having considered all of the evidence, the jurors unanimously agreed on the presence of a particular mitigating factor, then they

could embark on a second step -- namely, weighing that mitigator against any aggravating circumstances proved by the state beyond a reasonable doubt. If the jury considered and *rejected* that mitigating evidence, that is, if the jurors could not unanimously agree that a particular mitigating factor was present, then that mitigating factor could not be part of the second-step weighing process.

The Mills rule thus goes beyond the principle that the jury must be allowed to consider mitigating evidence; Mills commands that it be considered at a particular point in the deliberative process. In doing so, Mills invalidated a state rule requiring juror unanimity -- the kind of rule that had once been entirely left to the states. See McKoy v. North Carolina, 494 U.S. 433, 467 (1990) (Scalia, J., dissenting) (noting that, before Mills, Court had never before invalidated a jury-unanimity requirement). Indeed, as the dissent in McKoy also noted, this Court had previously *approved* unanimity requirements in similar contexts. See Martin v. Ohio, 480 U.S. 228 (1987) (approving unanimity requirement as condition to establishing defense of self-defense in capital murder case); Patterson v. New York, 432 U.S. 197 (1977) (as condition to establishing defense of extreme emotional disturbance in murder case); Rivera v. Delaware, 429 U.S. 877 (1976) (as condition to establishing defense of insanity in murder case).

While Lockett, Eddings, Skipper and Hitchcock certainly informed the Mills decision, those earlier cases did not make the Mills rule inevitable. Saffle v. Parks, 494 U.S. 484, 490 (1990) (Lockett and Eddings "do not speak directly, if at all, to ... *how* [the jury] must consider the mitigating evidence," as opposed to "*what* mitigating evidence the jury must be permitted to consider in making its sentencing

decision.") (emphasis in original). For Teague purposes, then, Mills announced a new rule, and cannot apply to older cases like this one unless one of the exceptions to the nonretroactivity rule applies.

There are two exceptions to that rule, but only one of these might be applicable to Mills. This is the so-called "second Teague exception;" as this Court has explained, "[a] rule that qualifies under this exception must ... 'alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding." Sawyer v. Smith, 497 U.S. 227, 242 (1990), quoting Teague, 489 U.S. at 311. By way of example, this Court has cited the rule of Gideon v. Wainwright, 372 U.S. 335 (1963) -- announcing the right of criminal defendants to be represented by counsel -- as the sort of "bedrock procedural element" that would qualify for retroactive application. Saffle, 494 U.S. at 495. On the other hand, this Court has also warned that the second Teague exception will be rare in application: "Whatever the precise scope of this exception, it is clearly meant to apply only to a small core of rules requiring observance of those procedures that ... are implicit in the concept of ordered liberty." Graham, 506 U.S. at 478 (internal quotations omitted). See also Teague, 489 U.S. at 313 ("we believe it unlikely that many such components of basic due process have yet to emerge."). Thus, this Court has held that a variety of new rules do not meet the second Teague exception. See, e.g., O'Dell v. Netherland, 521 U.S. 151, 167 (1997) (rule of Simmons v. South Carolina, requiring that jury be instructed of defendant's parole-ineligibility if prosecution argues that he poses a future danger, not a watershed rule under Teague); Lambrix v. Singletary, 520 U.S. 518, 539-40 (1997) (rule of Espinosa v. Florida, that if judge in "weighing" state is required to give weight to jury's sentencing recommendation

then neither judge nor jury can consider invalid aggravating circumstance, does not qualify for second Teague exception); Graham, 506 U.S. at 478 (proposed new rule requiring special jury instruction concerning mitigating evidence would not qualify for Teague exception); Sawyer, 497 U.S. at 241-44 (rule of Caldwell v. Mississippi, that Constitution prohibits imposition of death sentence where sentencer has been led to believe that ultimate responsibility for determining appropriateness of punishment lies elsewhere, not "watershed rule" under Teague.)

The Mills rule does not meet the second Teague exception, either. It did not change the substance of what a capital jury must consider -- that had already been done, by Lockett and succeeding cases. Rather, Mills requires states to allow consideration of mitigating evidence in a later phase of deliberations, that is, when the jury determines the consequences of its having found aggravating circumstances. In other words, Mills regulates not *what* the jury can consider, but *how* it can consider it. This is not the sort of rule that is "implicit in the concept of ordered liberty;" it has not fundamentally altered the way we conceive of a fair trial. Accordingly, the second Teague exception does not apply.

For the purposes of this petition, however, the important point is that the Mills/Teague issue should be decided, one way or the other. There is a sharp judicial split of opinion on the issue, and the outcome of many older death penalty cases depends on its resolution. This Court should grant *certiorari* and review this critical question.

III. The Pennsylvania Supreme Court's rejection of the *Mills* claim, was reasonable; this Court should grant *certiorari* to clarify the principle that habeas relief is

available only where the state court is not only wrong, but unreasonable.

If Mills is found to be retroactive, there is one more important issue to be resolved in this case -- the merits. The court below engaged in a textbook misapplication of the AEDPA standard of review. This Court should grant review to reaffirm the principle that reasonable state court opinions must be respected.

The AEDPA standard of review has been the subject of much discussion and debate, but its central principles are easy to understand. Prior to AEDPA, the lower federal courts were free to ignore state court decisions on mixed questions and consider the underlying issues de novo. See, e.g., Miller v. Fenton, 474 U.S. 104, 111-12 (1985). Thus, a single federal judge could overturn the perfectly reasonable decision of an entire state judicial system merely because that judge disagreed with it. The new standard reframes the inquiry and directs the federal habeas court to assess the reasonableness of the state court determination in light of governing Supreme Court precedent.

The trial court instructed the jury as follows, in pertinent part, as quoted by the court below:

> The sentence you impose will depend on your findings concerning aggravating and mitigating circumstances. The Crime Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances, or if the jury unanimously finds one or more aggravating

> circumstances which outweigh any mitigating circumstance or circumstances.
>
> Remember, under the law of this Commonwealth, your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstance, or if you unanimously find one or more aggravating circumstances which then outweigh any mitigating circumstances. In all other cases, your verdict would be life imprisonment.

App. 39-40.

These instructions do not violate Mills; they contain no requirement that the jurors be unanimous as to the presence of a particular mitigating factor before they can consider it. In fact, if the jury follows these instructions -- and this Court must presume they did so -- then there is no constitutional problem. The jury was directed to proceed in several predictable stages. First, if the jurors unanimously agree that one or more aggravating circumstances have been proved, and they also unanimously agree that no mitigating factors are present, then they must return a sentence of death. If they are not unanimous with respect to the absence of mitigating factors -- that is, if *any* of them believe that one or more mitigating circumstances are present -- the jurors move to the second phase: if they are unanimous as to the presence of a particular aggravator, then they must weigh this aggravator against "any mitigating circumstances." This is entirely proper, and it does not violate Mills.

The premise of the panel's decision is that the jury could have understood the instructions to mean something they did not say: that the last phrase quoted above, "any

mitigating circumstances," could have been understood as "any *unanimously found* mitigating circumstances," thus leading the jury to ignore any mitigating circumstance that was not "*unanimously found*." But this critical phrase is not there. The instruction, by its plain language, did not impose a unanimity requirement on the consideration of mitigators -- on the contrary, the jury was charged to consider "any" mitigating factor. The Third Circuit's decision is simply based on speculation that confusion was a *possibility*.

According to the opinion below, no court could reasonably uphold these instructions in the fact of a Mills challenge. This is truly a remarkable conclusion, because the Third Circuit has *itself* upheld similar instructions. A decade ago, before the national debate on the death penalty had reached its present intensity, a different Third Circuit panel rejected the theory that the jurors were reasonably likely to understand a comparable jury charge to require unanimity as to mitigating factors. See Zettlemoyer, 923 F.2d at 308. The instructions at issue in Zettlemoyer are set out in the margin; [2] even a cursory reading reveals this charge to be nearly

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[2] The trial court in Zettlemoyer issued a similar instruction:

> ... If you find that aggravating circumstance [that the murder victim was a prosecution witness] and find no mitigating circumstances *or if you find that the aggravating circumstance which I mentioned to you outweighs any mitigating circumstance you find*, your verdict must be the death penalty.
>
> * * *

(continued ...)

identical to the instructions at issue here -- the standard Pennsylvania instructions. The state courts, therefore, could safely assume that the jury charge had been approved by the Third Circuit.

Six years later, something changed. As a matter of English structure, the instruction in Frey, 132 F.3d 916, was the same as the Zettlemoyer instruction; but panel nevertheless found a way to distinguish the earlier case. The Frey panel employed a "sound bite" analysis, essentially requiring the reviewing court to count the number of words that come between the terms "unanimous" and "mitigating" in any given jury charge. 132 F.2d at 923. In Frey, the panel found the instruction to fail the "sound bite" test, because the words were close together -- their respective phrases were separated by seven words, rather than the longer seventeen word separation in Zettlemoyer. 132 F.3d at 923.

Whatever the merits of the "sound bite" analysis, it is far from obvious. See Abdur'rahman v. Bell, 226 F.3d 696, 712 (6th Cir. 2000) (rejecting claim that proximity of terms "unanimous" and "mitigating circumstances" could have led to jury confusion), cert. denied, 122 S. Ct. 386 (2001). In

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> ... Under the law, as I said, you are obligated by your oath of office to fix the penalty at death *if you unanimously agree and find beyond a reasonable doubt that there is an aggravating circumstances [sic] and either no mitigating circumstance or that the aggravating circumstance outweighs any mitigating circumstances.*

t 307-308 (emphasis added).

fact, even in Frey, the panel recognized that the Commonwealth's contrary analysis was "plausible." 132 F.3d at 924. But now, the panel in this case has gone much further. Frey is no longer merely the better interpretation of two plausible alternatives -- now it is the only reasonable conclusion. This cannot be squared with Frey's "plausible" language; in fact, the author of Frey, Chief Judge Edward R. Becker, would have granted rehearing in this case. App. 2.

The court below did not discuss Zettlemoyer, or even acknowledge that an earlier panel had decided a similar case in a contrary way.[3] This is unfair to the state courts. The message is implicit but clear: The panel's decision conflicts with Zettlemoyer, and yet when the state court follows Zettlemoyer-style analysis it is the state court that is "unreasonable."[4]

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[3] The only brief mention of Zettlemoyer in the panel's opinion appears in a lengthy block quote from Frey; Zettlemoyer is never specifically identified or explained, and no citation is given.

[4] The Pennsylvania Supreme Court has repeatedly noted its agreement with Zettlemoyer and its disagreement with Frey. See Commonwealth v. Chester, 733 A.2d 1242, 1256 n.14 (Pa. 1999) (citing Zettlemoyer in rejecting Mills claim; court also observes that Frey failed to apply Teague rule to bar retroactive application of Mills); Commonwealth v. Laird, 726 A.2d 346, 359 n. 12 (Pa. 1999) (same); Commonwealth v. Breakiron , 729 A.2d 1088, 1097 n.7 (Pa. 1999) (noting disagreement with Frey), cert. denied, 528 U.S. 1169 (2000); Cross , 726 A.2d at 337-38 (same; in the alternative, Mills should not apply retroactively).

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The Third Circuit's decision is wrong, even judged on its own. First of all, the panel applied the wrong standard by which to measure jury instructions. While it used to be appropriate to reject jury instructions that *might* be misunderstood, that is no longer the proper test. In Boyde v. California, 494 U.S. 370 (1990), this Court specifically rejected evaluative inquiries which primarily emphasized the *possibility* of juror confusion, that is, whether reasonable jurors "*could have*" been confused, or whether there was "*a substantial possibility*" that the jury was confused. Id. at 379. The Court in Boyde also rejected standards based on the mere possibility that a *single juror* was misled, rather than the jury as a whole. The Court adopted a more deferential and reliable test: "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." 494 U.S. at 380. This carefully reformulated standard requires a more significant showing on the claimant's part in order to demonstrate a constitutional violation, as this Court explicitly recognized. See id. ("a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a *possibility* of such an inhibition") (emphasis added); see id. at 387 (Marshall, J., dissenting) ("the majority's reasonable likelihood standard *is not met* where a reasonable juror *could* or *might* have interpreted a challenged instruction unconstitutionally") (emphasis added, internal quotation marks omitted).

Here, the Third Circuit repeatedly invoked a pre-Boyde standard. The panel asked whether the jury "*could have*" interpreted the instructions improperly; the panel also re-introduced the single juror standard, asking whether "*a reasonable juror could* so conclude." App. 41, 45 (emphasis added). This standard is more lenient, with respect to the

showing the claimant must make, than the law requires. The panel also cited the correct Boyde formulation, id. at 546, but failed to consistently apply it -- the pre-Boyde standard is repeated again and again. See App. 35 ("the critical question is ... whether a reasonable jury *could have* interpreted the instructions in an unconstitutional manner") (emphasis added), App. 38 (same), App. 41 (it is "quite possible" that instructions could have been interpreted improperly).

The source of the panel's confusion is readily apparent -- it is Mills itself. Mills was decided before Boyde, and in Boyde this Court specifically noted that the Mills opinion offers several improper formulations of the instructional standard: for example, whether jurors "could have" been confused, or whether there was a "substantial possibility" of confusion. Boyde, 271 F.3d at 379. But these standards are no longer correct, and so the Third Circuit was wrong to use them. The underlying issue here, properly framed, is whether the jury instructions here, measured by the Boyde standard, raised a reasonable probability that the jury would misunderstand the instructions so as to violate Mills.

Under AEDPA, of course, there is an additional layer of deference: The question for the federal habeas court is not whether the state court was wrong, but whether its decision was at least reasonable. It surely was. The Pennsylvania Supreme Court noted that the instructions "mirror[] the language found in the death penalty statute of our Sentencing Code" and observed that it had upheld substantively identical instructions in Commonwealth v. Hackett, 627 A.2d 719 (Pa. 1993), Commonwealth v. Marshall, 633 A.2d 1100 (Pa. 1993), and Commonwealth v. O'Shea, 567 A.2d 1023 (Pa. 1989), cert. denied, 498 U.S. 881 (1990). The Court had earlier explained that this language did not require jury

unanimity with respect to the *presence* of mitigating circumstances, but only regarding the *absence* of mitigating circumstances. Hackett, 627 A.2d at 725. Thus, even if a single juror believed that a particular mitigating circumstance was present, he or she could weigh it against any aggravating circumstance the prosecution might prove. Id.

The Third Circuit also criticized the Pennsylvania Supreme Court for analyzing the instructions as written, rather than their likely impact on a jury. 271 F.3d at 546. But that is not a fair criticism. The state supreme court simply noted that the instructions were identical to the language of the Pennsylvania death penalty statute, and observed that it had rejected challenges to similar instructions many times. 656 A.2d at 470. The Court then cited some of these earlier decisions. Id., citing Hackett, 627 A.2d 719, Marshall, 633 A.2d 1100, and O'Shea, 567 A.2d 1023. All of these earlier cases in turn cite Commonwealth v. Frey, 554 A.2d 27 (Pa. 1989), in which the Court had first applied Mills to the standard instructions in greater depth; the Court in Frey had concluded that "individual jurors were free to weigh whatever mitigating circumstances they perceived ..." 554 A.2d at 31. It cannot be seriously contended that the state court was obligated to repeat the analysis of its earlier decisions. Yet that is the thrust of the panel's decision.

None of the other circumstances of this case render the state court's decision unreasonable. The panel believed that the verdict slip, on which the jury recorded its decision, somehow increased the possibility of confusion -- but the slip's language exactly tracked the oral instructions. App. 45-47. If anything, the slip *reduced* the possibility of juror confusion. The whole point of the Third Circuit's analysis in Frey, and adopted by the panel in this case, is that when the

jurors *heard* the words "unanimous" and "mitigating" in one "sound-bite," they might have become confused. If the same words are *written down*, however, this is no longer a danger. On the contrary, where written instructions are at issue, the only question is whether the instructions are ambiguous as a matter of grammatical structure or language. But as a matter of grammar and language, the instructions in this case are identical to the instructions in Zettlemoyer, which the Third Circuit approved a decade ago. Thus, the existence of written instructions renders the state court decision *more* reasonable, not less.[5]

That the Pennsylvania Supreme Court's decision was at least reasonable is also clear from a review of other federal decisions. Many other circuits have rejected Mills challenges to similar instructions and verdict sheets. See, e.g., Scott v. Mitchell, 209 F.3d 854, 874 (6th Cir), cert. denied, 531 U.S. 1021 (2000) (no Mills issue where jurors told "all 12 of you must sign [the verdict form] ... [i]t must be unanimous"); Coe v. Bell, 161 F.3d 320, 338 (6th Cir. 1998), cert. denied, 528 U.S. 842 (1999) (instruction that jury must unanimously find aggravating circumstances are not outweighed by any

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[5] In state court, Banks also claimed that the polling of the jury had created the possibility of juror confusion. 656 A.2d at 470-71. At the end of the trial, Banks requested that the jury be polled; the trial court asked each juror whether he or she agreed with the verdict. In doing so, the court repeated some of the same language used in the instructions and the verdict slip. The Third Circuit agreed with the state court, however, that this jury polling had not made the possibility of juror confusion more likely. App. 48.

mitigating circumstances does not violate Mills); Parker v. Norris, 64 F.3d 1178, 1187 (8th Cir. 1995), cert. denied, 516 U.S. 1095 (1996) (that verdict form "failed to inform jurors that they could consider non-unanimous mitigating circumstances" did not violate Mills); Smith v. Dixon, 14 F.3d 956, 982 n.15 (4th Cir.) (*en banc*), cert. denied, 513 U.S. 841 (1994) (no Mills error where jury required to write "Yes" on the verdict form beside each mitigating circumstance "for which the defendant has satisfied you"); Griffin v. Delo, 33 F.3d 895, 905-906 (8th Cir. 1994), cert. denied, 514 U.S. 1119 (1995) (instruction that jury must unanimously find that any mitigating circumstances outweighed aggravating circumstances did not imply that jury must be unanimous in finding a mitigating circumstance); Lawson v. Dixon, 3 F.3d 743, 754 (4th Cir. 1993), cert. denied, 114 S.Ct. 1208 (1994) (same: court charged that jury must unanimously find that aggravating circumstance or circumstances outweighed "any" mitigating circumstances found); Maynard v. Dixon, 943 F.2d 407, 420 (4th Cir. 1991), cert. denied, 502 U.S. 1110 (1992) (instruction "impose[d] a unanimity requirement on aggravating circumstances and the other elements of the death sentence deliberations, but not ... as to the mitigating circumstances"); Kordenbrock v. Scroggy, 919 F.2d 1091, 1120 (6th Cir. 1990) (*en banc*) (nine of thirteen judges on *en banc* panel rejected Mills claim because there was no express unanimity requirement as to mitigation, and "it cannot be reasonably inferred that silence as to finding a mitigating factor would likely cause the jury to assume that unanimity was also a requirement"), cert. denied, 499 U.S. 970 (1991).

All of these courts have come to the same conclusion: If an instruction requires unanimity in one step of the sentencing process, that does not mean that the jury is likely to be confused about the other steps. The instructions here

pass the Boyde test, as the Pennsylvania Supreme Court concluded. This represents -- at the very least -- a reasonable application of Mills.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 99-9005

GEORGE E. BANKS,
Appellant

v.

MARTIN HORN, Commissioner, PA Dept of Corrections; JAMES PRICE, Superintendent of State Correctional Institute Greene; RAYMOND H. COLLERAN, Superintendent State Correctional Institute Waymart; COMMONWEALTH OF PENNSYLVANIA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 99-cv-00438)
District Judge: Honorable James F. McClure, Jr.

Present: BECKER, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, and FUENTES,
Circuit Judges

SUR PETITION FOR REHEARING *EN BANC*

The Appellees' Petition for Rehearing *En Banc* and Brief *Amicus Curiae* in support thereof having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED. Chief Judge Becker would have granted rehearing.

BY THE COURT:

/s/ Marjorie O. Rendell
Circuit Judge

Dated: DEC 11 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 99-9005

GEORGE E. BANKS,
Appellant

v.

MARTIN HORN, Commissioner, PA Dept of Corrections; JAMES PRICE, Superintendent of State Correctional Institute Greene; RAYMOND H. COLLERAN, Superintendent of State Correctional Institute Waymart; COMMONWEALTH OF PENNSYLVANIA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 99-cv-00438)
District Judge: Honorable James F. McClure, Jr.

Argued April 2, 2001

Before: SLOVITER, ROTH and RENDELL, Circuit Judges

(Filed: October 31, 2001)

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OPINION OF THE COURT

RENDELL, Circuit Judge.

George Banks was convicted by a Luzerne County, Pennsylvania jury of having committed thirteen murders, and

was sentenced to death. His direct appeals and filings under the Pennsylvania Post-Conviction Relief Act ("PCRA") failed. He sought habeas corpus relief in the District Court under 28 U.S.C. § 2254, which was denied. He comes before us now to appeal the District Court's ruling.

We have jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1291 and 2253. The District Court granted a certificate of appealability as to whether the sentencing phase instructions and forms violated *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), under our precedent in *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997), *cert. denied*, 524 U.S. 911, 118 S.Ct. 2076, 141 L.Ed.2d 151 (1998). By order entered June 27, 2000, we agreed to expand the certificate of appealability to include the issue of whether Banks failed to make a knowing, intelligent, and voluntary waiver of his Sixth Amendment right to counsel.

Because Banks's habeas corpus petition was filed after April of 1996,[1] the role of the District Court in reviewing the state court proceedings was governed by AEDPA.[2] Accordingly, the District Court's task was to

[1] We discuss our view of the applicability of AEDPA specifically at 9-10, *infra*.

[2] 28 U.S.C. § 2254(d) states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or

(Continued)

determine whether the state court's decision was either contrary to or an unreasonable application of Supreme Court precedent. The District Court found no basis on which to dispute the state court's ruling. Because the question of whether the District Court appropriately applied the AEDPA standard of review is a question of law, we review its conclusions in that regard de novo. *Berryman v. Morton*, 100 F.3d 1089,1095 (3d Cir. 1996).

A. DISCUSSION

On September 25, 1982 in Wilkes-Barre, Pennsylvania, Banks shot fourteen people with a Colt AR 15 semi-automatic rifle, killing thirteen and wounding one. The AR-15 is a civilian version of the military's M-16 rifle. Banks began his deadly spree at his own home, where he shot and killed three of his girlfriends and their five children, four of whom Banks himself had fathered. Banks then left his home clad in what appeared to be military fatigues. On the street outside he happened upon a group of bystanders who had heard the shots. Banks shot and killed one, a young man who had recognized him, and also shot and seriously wounded another. Banks then carjacked a car and drove to a trailer park, where he shot another girlfriend, their son, a second boy, and the girlfriend's mother. Two other boys survived the attack. After a stand-off at a friend's house, Banks surrendered.

At trial, the defense offered psychiatric experts who testified that Banks, who is bi-racial, suffered from paranoid

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involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

psychosis and was convinced that he was a victim of a racist conspiracy. The theory was offered that he killed his children to save them from suffering racism as he had. Banks testified on his own behalf and insisted on referring to graphic, gruesome pictures of the murders to try to show that there was a government conspiracy against him. Banks alleged that his shots had only wounded, not killed, some of the victims, and that the police had fired the lethal shots, after which some of the bodies were moved. He also alleged that the medical examiner covered up some wounds and enlarged or altered others to distort the information presented to the jury. He sought throughout the trial to exhume the bodies.

Banks was convicted by a state court jury of twelve counts of first degree murder, one count of third degree murder, criminal attempt to commit murder, two counts of recklessly endangering another person, robbery and theft by unlawful taking or disposition. In the penalty phase, the jury sentenced Banks to death and imprisonment.

Banks filed direct appeals and sought collateral relief in the state courts, as well as filing for federal habeas corpus relief. We need not detail all these proceedings, except that one aspect of the procedural posture of the case deserves attention. The government had argued to the District Court that Banks's habeas corpus petition was not filed in a timely manner. Under AEDPA, Banks was required to file his petition within one year of April 24, 1996, unless the deadline was tolled during the time a "properly filed" state petition for relief was pending. The government contended that because Banks's state court PCRA petition was filed late, it should not be deemed to have been "properly filed" for purposes of the tolling provisions under the federal statute. *See* 28 U.S.C. § 2244(d)(2). The government based its argument in part on *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998) ("We

believe that a 'properly filed application' is one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing.").

The government relied on the Pennsylvania Supreme Court's ruling in 1999 that the requirement for timely filing was "jurisdictional," rather than merely a statute of limitations. *See Commonwealth v. Banks*, 556 Pa. 1, 726 A.2d 374, 376 (1999) ("*Banks VI*"). The District Court did not accept that argument, however, noting that Banks could not be said to have been on notice prior to the Pennsylvania Supreme Court's holding in *Banks VI* that the Commonwealth would consider § 9545(b) to be jurisdictional, and that, especially in light of relaxed waiver in capital cases, and the policy of equitable tolling, Banks should not be barred because he reasonably could have construed the time requirement as procedural only. *See Banks v. Horn*, 63 F.Supp.2d 525, 533-34 (M.D. Pa. 1999) ("*Banks VIII*"). The District Court noted that since the exceptions allowed courts to hear some untimely petitions, not every provision in the statute could be jurisdictional, and, absent clear jurisdictional language, it is "entirely reasonable to conclude that § 9545(b) is a statute of limitations rather than a jurisdictional provision." *Id.* at 533. In *Banks VI*, the Pennsylvania Supreme Court cited to its decision in *Commonwealth v. Peterkin*, 554 Pa. 547, 722 A.2d 638 (1998), *petition for habeas corpus dismissed sub nom. Peterkin v. Horn*, 34 F.Supp.2d 289 (E.D. Pa. 1998), which states simply that the "General Assembly amended the PCRA to require that, as a matter of jurisdiction, a PCRA petition must be filed within one year of judgment," but the statement was not the court's holding, and the court did not elaborate on the reasoning underlying its conclusion. *Peterkin*, 722 A.2d at 641. *Banks VI* was the first time the Pennsylvania Supreme Court held that a court was deprived of jurisdiction when the deadline was not met. As

the District Court noted, by concluding that the time limitation was jurisdictional, the Pennsylvania Supreme Court thought it was foreclosed from applying the relaxed waiver standard in Banks's case. 63 F.Supp.2d at 533.

Banks argues that, quite apart from the issue of how the "properly-filed" requirement of 28 U.S.C. § 2244(d)(2) is construed, we should consider his habeas petition as properly before us. First, he urges that because his first petition was filed pre-AEDPA he is not bound by AEDPA's provisions. In the alternative, he takes the position that the issue of timeliness of his habeas petition is not even before us on appeal since the government has not challenged the District Court's ruling in its counterstatement of issues, and has failed to discuss the issue in its brief, except for its conclusory reference to its position in a footnote.

Banks argues that his habeas petition was timely because it was not governed by AEDPA's one-year limitation period, but, rather, by pre-AEDPA law. In support of this theory, Banks urges that the habeas petition he filed in the District Court after AEDPA merely reasserted claims previously filed pre-AEDPA, so that it "relates back to the original filing date of Banks' pre-AEDPA petition." We disagree. The applicability of AEDPA does not turn upon a comparison of claims in successive petitions. It is, rather, governed solely by the date of the petition's filing. *See, e.g., Hull v. Kyler*, 190 F.3d 88, 103 (3d Cir. 1999); *Jones v. Morton*, 195 F.3d 153, 160-61 (3d Cir. 1999). Any petition that is filed subsequent to AEDPA is governed by AEDPA standards. In his argument, Banks relies on *Coss v. Lackawanna Cty. Dist.*

Atty., 204 F.3d 453 (3d Cir. 2000).[3] But *Coss* involved a unique factual setting in which Coss's petition was pending pre-AEDPA, and while it was pending, Coss filed another petition solely to *remove* the claims that the district court had held unexhausted. We thus viewed the second petition as "tantamount to a further amendment or clarification to the initial petition, filed at the direction of the District Court. . . ." 204 F.3d at 461. We were addressing the merits of his pre-AEDPA petition. If, instead, Coss's petition had been dismissed, and he had then filed either an identical petition or a petition absent the unexhausted claims after AEDPA's effective date, we would have been compelled to find that AEDPA controlled. Once a petition has been dismissed, a subsequent petition is a new petition and is governed by AEDPA.

As to Banks's contention that the issue as to whether his petition is time-barred is not before us because of the government's failure to specifically raise and brief the issue by way of cross-appeal, we believe that, in light of the District Court's careful analysis of this issue and its importance, and because the government did make reference to the issue albeit in a footnote -- we should examine whether the statutory filing requirements were met. *Silber v. United States*, 370 U.S. 717, 717-18, 82 S. Ct. 1287, 8 L.Ed.2d 798 (1962).[4]

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[3] The Supreme Court reversed and remanded on grounds not at issue here. *See Lackawanna Cty. Dist. Atty. v. Coss*, 531 U.S. 923, 121 S.Ct. 297, 148 L.Ed.2d 238 (2000).

[4] Even if not raised, we believe we could consider this issue sua sponte. "While ordinarily we do not take note of errors not called to the attention of the Court of Appeals nor properly raised

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Should Banks's second state court PCRA filed in January 1997 be deemed properly filed such that the one-year AEDPA filing requirement did not begin to run until the Pennsylvania Supreme Court finally ruled on it in March 1999? If so, then Banks's habeas petition was filed in time. If not, then we need to decide whether the AEDPA one-year period barred his petition or whether it should be equitably tolled.[5]

It seems clear that, technically, Banks's filing of his second PCRA in January 1997 was too late under Pennsylvania law. This is because the Pennsylvania legislature had enacted legislation in November 1995 requiring all petitions, including second or successive petitions, to be filed within one year of the final order on direct appeal unless

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here, that rule is not without exception. The Court has `the power to notice a `plain error' though it is not assigned or specified,' . . . `In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *Silber*, 370 U.S. 717-18, 82 S.Ct. 1287, 8 L.Ed.2d 798 (internal citations omitted) *See also Acosta v. Artuz*, 221 F.3d 117 (2d Cir. 2000); *Kiser v. Johnson*, 163 F.3d 326 (5th Cir. 1999).

[5] We note that the Supreme Court's recent ruling in *Duncan v. Walker* does not bear on this issue because here, unlike the situation in *Duncan*, the time period was violated unless there is equitable tolling for the state proceedings, even if the time during which Banks's first federal habeas petition was pending is taken into account. 533 U.S. 167, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001).

certain exceptions were met.[6] 42 Pa.Cons.Stat. § 9545 (Act of November 17, 1995, Special Session No. 1 P.L. 1118, No. 32, effective in 60 days).

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[6] The text of the relevant statutory provision is:

(B) TIME FOR FILING PETITION.--

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States; (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

However, was the petition therefore necessarily not "properly filed"? While we could explore this concept under the applicable Pennsylvania law and under the federal habeas case law, *see, e.g., Artuz v. Bennett*, 531 U.S. 4, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000), we need not do so, because we conclude that, even were we to decide that the late filing of Banks's second PCRA rendered it not "properly filed," the District Court appropriately called on equitable principles to toll the one-year AEDPA requirement given this unusual fact pattern. Here, as the District Court points out, the state of the Pennsylvania law regarding the nature of the filing requirement was unclear, and Banks could reasonably have viewed the state time limit as a mere statute of limitations subject to equitable tolling, not, as the Pennsylvania Supreme Court later held in *Banks VI*, a jurisdictional requirement. The District Court noted that viewing this later ruling as a bar would result in unfair forfeiture without notice. *Banks VIII* at 534. This circumstance provides a basis for us to call on equitable principles in application of *our own* federal time parameters -- the one-year AEDPA requirement.

We have recently had occasion to examine this issue. In *Fahy v. Horn*, we described the state of the law at the time of Fahy's fourth PCRA petition, which was also the time period when Banks's petition was pending, as "inhibitively opaque." 240 F.3d 239 (3d Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S.Ct. 323, ___ L.Ed.2d ___ (2001). We noted that in *Banks*, we had required Banks to return to state court because even *we* believed the relaxed waiver rule might well apply. How can we expect Banks to have predicted the ultimate ruling of the Pennsylvania Supreme Court when *we* could not?

In *Fahy* we stated:

> When state law is unclear regarding the operation of a procedural filing requirement, the petitioner files in state court because of his or her reasonable belief that a § 2254 petition would be dismissed as unexhausted, and the state petition is ultimately denied on these grounds, then it would be unfair not to toll the statute of limitations during the pendency of that state petition up to the highest reviewing state court.

Fahy v. Horn, 240 F.3d at 245.

The same rule applies here. The Pennsylvania Supreme Court had denied Banks's first PCRA petition in March 1995, and he had filed his first habeas petition in February 1996. Thus, his federal action was pending when AEDPA was passed in April 1996. Because the district court determined that Banks's claims could be adjudicated and the petition was not subject to dismissal as mixed, it was not until the Third Circuit reversed that determination and ordered the petition dismissed as mixed in September 1997 that it would be equitable to begin calculating a delay in filing against Banks, and because he filed his second PCRA petition while the appeal was still pending, there was no delay whatsoever. Subsequently, here, as in *Fahy*, Banks did not delay in seeking federal relief, filing his habeas petition two weeks after his state collateral proceedings were concluded. Thus, the equities are in his favor. Not only is there "no evidence of abuse of the process" by Banks, but it seems as clear as in Fahy's case that he "diligently and reasonably asserted his claims." *Id.* at 244-45. Accordingly, we conclude that the District Court was quite correct in its resort to equitable principles, and properly entertained Banks's petition on its merits, as we will as well.

B. ISSUES ON APPEAL

We granted Banks a Certificate of Appealability regarding two issues:

(1) Banks contends that the trial court erred in not having explored whether he was making a knowing, voluntary and intelligent waiver of his right to counsel during the trial. However, the District Court concluded that, by pursuing his own strategy at trial, Banks's situation was one of hybrid representation, but that there was no clear requirement under either United States Supreme Court precedent, nor under our case law, that a defendant "is entitled to an inquiry by the trial court before it exercises its discretion to permit hybrid representation." *Banks VIII*, 63 F.Supp.2d at 543.

(2) Banks contends that the jury instructions and verdict sheets during the penalty phase violated *Mills v. Maryland*, and the Pennsylvania Supreme Court unreasonably applied the Supreme Court precedent in finding that his death sentence was not constitutionally infirm.[7] The District Court rejected Banks's challenge, reasoning that it was to evaluate whether *Mills* applied only to Banks's trial and direct appeal, and concluded that it did not, since Banks's

[7] The District Court had granted a certificate regarding the *Mills* issue and we enlarged it to include the Sixth Amendment issue. *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1045 (7th Cir. 2001). The Third Circuit's Local Appellate Rules provide: "If the district court grants a certificate of appealability as to only some issues, the court of appeals will not consider uncertified issues unless petitioner first seeks, and the court of appeals grants certification of additional issues." 3d Cir. R. 22.1(b).

We note that the issue of Banks's competency to stand trial was previously litigated on appeal and is not before us.

conviction became final before *Mills* was decided and *Mills* has not been made retroactive by the United States Supreme Court. The District Court further distinguished our holding in *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997), reasoning that *Frey* involved a pre-AEDPA petition. *Id.* at 543-44.

We will address these issues in turn.

(1) Waiver of Representation of Counsel

Banks urges that the trial court should have conducted a colloquy with him, establishing that he knowingly and voluntarily waived his right to counsel before allowing Banks to engage in certain conduct during the trial, contrary to the advice of his counsel. Banks was represented throughout the proceeding, but he contends that he took over certain "core functions" at times, such that a colloquy was required.

Clearly, Banks and his counsel disagreed as to whether he should testify, and as to the scope of the testimony. Banks wanted to testify because he believed that it was critical for him to expose the conspiracy that he urged resulted in the deaths and in altered injuries to those he was accused of killing. During his testimony, therefore, Banks introduced the coroner's reports and photographs that had been ruled inadmissible prior to trial. Although counsel and the trial court warned Banks that the pictures were inflammatory, and that his testimony about the pictures and his showing them to the jury would allow the prosecutors to use them as well, Banks insisted that he was "forced into this," and that the pictures were "part of my evidence to the fact that they've twisted everything around."

Banks also, and again contrary to the advice of counsel, insisted that the medical examiners be questioned about

details and supposed inconsistencies in the photographs. The colloquy between counsel and the trial court before the recall of one of the medical examiners is telling:

> Defendant: [T]hey're asking me to do the questioning. I prefer not to, because I'm not qualified to do it.
>
> The Court: Then I will ask you to consult with counsel and I will ask counsel to prepare and ask the questions.
>
> [Defense counsel]: Your Honor, the three of us have reviewed this, and we can't conceive of any questions to ask the doctor.
>
> The Court: Mr. Banks will discuss with you the questions he proposes to ask, and I think counsel should ask the questions.

Banks himself also cross-examined a deputy coroner and a police officer.

There is no question that the defendant's testimony and the introduction of the previously excluded photographs were, as the Court predicted, inflammatory. There is also no question that the testimony, the introduction of the photographs, and the examinations of the witnesses were contrary to the advice of counsel, and eroded the protections counsel had secured for Banks prior to trial. We note that the trial court warned Banks repeatedly of his need to adhere to the rules of the court and insisted that where the rules of evidence and procedure were concerned it would "treat [Banks] like a lawyer," and that one could infer from the court's phrasing that Banks was to some extent acting as his own

counsel. At no point, however, did Banks request that counsel withdraw and that he be allowed to proceed pro se.

The issue that Banks has presented to us is whether, even absent an affirmative declaration of a desire to proceed pro se, his actions were so contrary to counsel's advice and involved such significant control over his defense as to render him effectively unrepresented, and whether, if we so find, the trial court should have concluded that Banks was effectively proceeding pro se and should have conducted a Sixth Amendment waiver inquiry before allowing Banks to testify. The issue that we must actually resolve, however, is much more circumscribed, because of the scope of review under AEDPA. That is to say, our analysis is limited to whether the court failed to apply, or misapplied, clearly established U.S. Supreme Court precedent. The first step in our analysis, therefore, is to define whether any U.S. Supreme Court precedent mandated -- either directly or by extension to these facts -- that the trial court personally ensure that Banks was making a voluntary, intelligent, and knowing waiver of his Sixth Amendment right to counsel in a setting such as this. We note that the trial court did discuss certain rights with Banks before he testified:

> Mr. Banks, once again, I will preface my remarks by saying this is not a lecture. This is a responsibility I have as a trial judge, to be assured that you understand the rights that you have and the rights, by testifying, that you'll give up.

In the course of this discussion, the court advised Banks that he had a right not to testify and that he could be prejudiced if he disregarded counsel's advice by his testimony and by introducing exhibits as part of his testimony. But the

court never specifically inquired as to a waiver by Banks of his Sixth Amendment right to counsel:

> You understand, do you not, that the procedure is that counsel ask questions? May I suggest to you then that I will give you some time. You will consult with your counsel, so that you may give them the questions, so that they can properly phrase them for you.
>
> Let me caution you on another matter that might come up. You understand if you propose to use any exhibits, that you will be required to comply with the rules of evidence concerning exhibits.

The court did inquire whether Banks understood that he was not required to testify, that he had a constitutional right to remain silent, and that by testifying he would give up the right to remain silent. When Banks asked if he could continue to rely on the Fifth Amendment, the court explained to him that he could not, assuring Banks that "I don't want you to do anything that will harm you." The court further explained that the testimony might open avenues for questioning that would otherwise remain closed and urged Banks to follow counsel's advice. Throughout the discussion, Banks remained adamant that he wanted to testify. Thus, in evaluating the case law we are not assessing the quality of the inquiry made by the trial court, but only whether an inquiry specific to the waiver of counsel was mandated.

The two Supreme Court opinions referenced by the parties, *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), *reh'g denied*, 465 U.S. 1112, 104 S.Ct. 1620, 80 L.Ed.2d 148, address situations that are different from the case before us, not only on

the facts, but also on the principles that informed the Court's decisions. *Faretta* recognizes that a defendant who indicates a desire to represent himself and proceed without counsel has the right to do so, as long as he knowingly and intelligently waives his right to counsel. The defendant in *Faretta* wanted to manage his own defense; he did not want counsel to act on his behalf. The issue before the court was the extent to which a defendant has the right to present his own defense. The Court concluded that "the defendant . . . must be free personally to decide whether in his particular case counsel is to his advantage." 422 U.S. at 834, 95 S.Ct. 2525. That decision must be honored by the court, even if the choice is detrimental, "out of that respect for the individual which is the lifeblood of the law.'" *Id.* (*quoting Illinois v. Allen*, 397 U.S. 337, 350-351, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), *reh'g denied*, 398 U.S. 915, 90 S.Ct. 1684, 26 L.Ed.2d 80).

The Court recognized that managing one's own defense results in the relinquishment of "the traditional benefits associated with the right to counsel." 422 U.S. at 835, 95 S.Ct. 2525. It is the relinquishing of these benefits that triggers the requirement of a knowing, voluntary, and intelligent waiver. *Id.* at 835, 95 S.Ct. 2525.

In *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), reh'g denied, 465 U.S. 1112, 104 S.Ct. 1620, 80 L.Ed.2d 148, the Supreme Court addressed the scope of the right to conduct one's own defense, holding that this right was not violated by the unsolicited participation of standby counsel. Again, the focus of the Court was on determining to what extent a court could circumscribe a defendant's right to present his own defense. The Court found that the appointment and limited participation of standby counsel was not inconsistent with the "dignity and autonomy of the accused." *Id.* at 177, 104 S.Ct. 944. The Court noted that a

"defendant does not have a constitutional right to choreograph special appearances by counsel." *Id.* at 183, 104 S.Ct. 944. The interest of the court in appointing standby counsel is to assist the defendant to comply with court rules and protocol and enable him to achieve "his own clearly indicated goals." *Id.* at 184, 104 S.Ct. 944.

While *McKaskle* provides guidance to courts as to where the line is crossed between the assistance or enabling of standby counsel to an already pro se defendant and impermissible intrusion, it does not provide any guidance to courts for the reverse situation, i.e., when does a defendant who is represented by counsel cross the line from being represented to proceeding pro se? We cannot say that either *Faretta* or *McKaskle*, both affirmations of the liberty and autonomy rights of a defendant, define a line of self-expression that defendants cannot cross without the court's securing of a knowing, voluntary and intelligent waiver.

Banks agreed to the continued representation by his counsel throughout trial, and while he performed some tasks contrary to counsel's advice, he never did so unattended or unadvised by counsel. In fact, it is clear from the record that he received counsel's advice on an ongoing basis. A disagreement between counsel and a defendant is not enough in itself to render a defendant pro se. *Hakeem v. Beyer*, 990 F.2d 750, 765 (3d Cir. 1993). Accordingly, the cases requiring a waiver colloquy when the defendant indicates a desire to proceed pro se do not in themselves dictate such a procedure here.

Moreover, to the extent that Banks has urged that the right to testify on one's behalf -- which was perhaps the most troubling of Banks's strategic decisions -- should be somehow constricted if necessary to ensure Sixth Amendment

rights, this seems to run directly counter to *Faretta*, and its focus on an individual's right to control his defense. *Faretta*, 422 U.S. at 834, 95 S.Ct. 2525. Further, we know of no 15 case that interposes a requirement of a colloquy in connection with the right to testify on one's own behalf.[8]

The Pennsylvania Supreme Court's analysis focused solely on Banks's decision as an exercise of his right to testify on his own behalf. It did not view Banks's choices as implicating his Sixth Amendment rights.[9] Banks says that this analysis is contrary to a line of cases that stand for the proposition that such a colloquy is required when there is "hybrid representation," that is, where an attorney and a defendant each address the court or in other ways share defense functions.[10]

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[8] In *Boardman v. Estelle*, the Ninth Circuit analogized a right to allocution to the right to testify in one's own behalf and characterized them as "entirely separate. . . . A defendant who elects representation by counsel does not simultaneously waive his right to testify at trial." 957 F.2d 1523, 1528 (9th Cir.), *cert. denied*, 506 U.S. 904, 113 S.Ct. 297, 121 L.Ed.2d 221 (1992). Likewise, the exercise of one's personal right to testify is not tantamount to proceeding pro se.

[9] The dissent in *Banks II*, however, both viewed the issue as raising Sixth Amendment concerns and viewed the trial court as violating Banks's Sixth Amendment rights. See discussion, *infra* at 25-26.

[10] Interestingly, Banks's approach to this issue seems to have come full circle and, at oral argument, his counsel argued the issue precisely as the Pennsylvania Supreme Court had characterized it, namely, as a duty to prevent Banks from testifying. And, in his brief, Banks quotes the extensive colloquy between Banks and the

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In the typical hybrid representation, a trial court acts in its discretion to appoint standby counsel for a pro se defendant who later challenges the attorney's role as overly intrusive under *Faretta*'s right to self- representation. *See, e.g., McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), *reh'g denied*, 465 U.S. 1112, 104 S.Ct. 1620, 80 L.Ed.2d 148. Some federal courts have opined that a colloquy should be conducted when the defendant assumes "core functions" of the defense.

> When the accused assumes functions that are at the core of the lawyer's traditional role . . . he will often undermine his own defense. Because he has a constitutional right to have his lawyer perform core functions, he must knowingly and intelligently waive that right.

United States v. Kimmel, 672 F.2d 720, 721 (9th Cir. 1982). *But see United States v. Leggett*, 81 F.3d 220 (D.C.Cir. 1996) (cross-examination of some witnesses, asking of questions of defense counsel, proposing questions for other witnesses and delivering closing argument did not require the trial court to give waiver warnings); *see also Bontempo v. Fenton*, 692 F.2d 954, 960 (3d Cir. 1982), *cert. denied*, 460 U.S. 1055, 103 S.Ct. 1506, 75 L.Ed.2d 935 (1983) (supplemental closing statement); *Robinson v. United States*, 897 F.2d 903, 906-07 (7th Cir. 1990) (same).

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trial court before, and during, his testimony, and urges that the court should have mentioned the right to counsel and warned of inherent danger in waiving counsel. We find no support for the proposition under *Faretta* or *McKaskle*, nor has any Supreme Court case been referenced as authority for this proposition.

As we have noted, under the standards of *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), we may challenge the state court analysis only if it is contrary to or unreasonably applies clearly established federal law. It is unclear whether it must be stated in Supreme Court precedent, or whether it may be derived from principles enunciated in Supreme Court precedent. *Id.* at 408-09 ("Today's case does not require us to decide how such 'extension of legal principle' cases should be treated under § 2254(d)(1)."). Regardless, we conclude that the federal decisions do not apply so directly to the facts at hand so as to constitute an extension of principles enunciated in Supreme Court precedent. The lack of clearly applicable principles in such precedent is fatal to Banks's argument. While the decisions Banks cites might inform our decision were we reviewing a district court trial, we are not here engaged in "the broad exercise of supervisory power" that we would possess over a district trial court decision. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) (quoting from the appellate court opinion, 473 F.2d 1236, 1238 (1st Cir. 1973)). *See, e.g., United States v. Davis*, 269 F.3d 514 (5th Cir. 2001) (reversing the district court's handling of hybrid representation situation).

The Supreme Court has never addressed a situation such as this, let alone indicated that the situation would implicate a Sixth Amendment right in the same way as defendant's right to proceed without counsel, or the prerequisites to a defendant's proceeding pro se. Banks did not reject the assistance of counsel; he acted with counsel's assistance, but chose to reject the advice of counsel. Although we have found some federal decisions that have adapted the case law to "hybrid" factual settings, we find none of these rulings to be persuasive extensions of U.S.

Supreme Court precedent so as to constitute clearly established law regarding Sixth Amendment violations in such a fact pattern. [11] Further, many of the decisions are

[11] We note that Banks cites several Pennsylvania cases that he contends bear on the issue before us: *Commonwealth v. Bell*, 442 Pa. 566, 276 A.2d 834 (1971); *Commonwealth v. McGrogan*, 449 Pa. 584, 297 A.2d 456 (1972); *Commonwealth v. Palmer*, 315 Pa.Super. 601, 462 A.2d 755 (1983). In one, the Pennsylvania Supreme Court stated that the introduction of evidence is a function that is allocated solely to counsel. *Commonwealth v. Bell*, 442 Pa. 566, 276 A.2d 834 (1971). In *Banks I*, Chief Justice Nix dissented, and was joined in his dissent by Justice Zappala, because he concluded that, in accordance with *Bell*, Banks had assumed a function allocated to counsel and "was acting as his own attorney and was representing himself." 521 A.2d at 23. While Chief Justice Nix's interpretation of Pennsylvania case law would require a waiver colloquy so as to afford federal constitutional protections, his was not the majority opinion. None of the Pennsylvania cases referred to us by Banks appears to be directly on point. Further, it is not our province to determine whether the Pennsylvania Supreme Court's decision was contrary to, or an unreasonable application of, its *own* precedent, but, rather, of clearly established federal precedent.

The three federal cases that Banks cites in addition to *McKaskle* and *Faretta* as defining an "exclusive province of counsel" at trial are inapposite. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) is concerned exclusively with whether *appellate* counsel is obligated to raise all nonfrivolous claims proffered by the appellant. *See id.* at n. 7. In *Vess v. Peyton*, 352 F.2d 325 (4th Cir. 1965), *cert. denied*, 383 U.S. 953, 86 S.Ct. 1215, 16 L.Ed.2d 214 (1966), the Fourth Circuit affirmed the district court's determination that there was no error in appellant's not having been provided counsel at a preliminary hearing (a determination that is no longer good law) and that the record supported the conclusion that appellant's guilty plea was knowingly

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unpublished and have no precedential value.[12] Accordingly, we agree with the District Court that Banks is not entitled to habeas relief on this ground.

(2) Application of Mills v. Maryland in the Penalty Phase

Banks contends that the Pennsylvania Supreme Court determination regarding the jury instructions and verdict slip during the penalty phase involved an unreasonable application of *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). The District Court did not disturb the Pennsylvania Supreme Court's ruling regarding the penalty phase, reasoning that *Mills v. Maryland* was not retroactive, and also stating in summary fashion that "Supreme Court precedent (in the form of *Mills* and *McKoy*) did not require

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and voluntarily offered. The court also rejected appellant's contention that the failure to call certain witnesses suggested by the defendant did not constitute inadequate representation of counsel. Likewise, *Buckelew v. United States*, 575 F.2d 515 (5th Cir. 1978) rejected a claim that an uncalled out-of-state witness constituted ineffective assistance of counsel. None of these cases could be read to mandate that a trial judge treat defendant's insistence upon testifying, and his introduction of evidence as part of that testimony -- or even the directing and conducting of the cross-examination -- as an assertion of a right to proceed pro se.

12 *See, e.g., Robinson v. United States*, 897 F.2d 903 (7th Cir. 1990); *United States v. Parker*, 176 F.3d 486 (9th Cir. 1999) (unpublished); *Islam v. Miller*, 166 F.3d 1200 (2d Cir. 1998) (unpublished); *United States v. Demeke*, 152 F.3d 921 (2d Cir. 1998) (unpublished).

an outcome contrary to that reached by the state courts." *Banks VIII* at 544. We disagree with both conclusions.

(a) Does Mills Apply?

We first note that the District Court apparently misperceived the way in which the AEDPA standard applies to the relevant state court proceeding. The Court stated that the *Mills* decision was rendered in 1988, five years after Banks's conviction and sentence.

However, the point in time at which the Supreme Court jurisprudence must have been "clearly established" is at the time that the state court makes the ruling on the federal constitutional issue that is being scrutinized. The Pennsylvania Supreme Court issued its opinion in *Banks II*, construing *Mills* in 1995, eight years after *Mills* became law. If the Pennsylvania Supreme Court had questioned whether *Mills* was applicable to the trial court's conduct, we would have needed to inquire whether Mills codified law that was clearly established at the time of the trial. But that is not the question before us. AEDPA defines the parameters of federal court review of state determinations of federal law. In the Pennsylvania Supreme Court opinion, it applied *Mills*. We are being asked to determine whether that application of *Mills* was contrary to, or an unreasonable application of, clearly established federal law. To make that determination, it is only the state court's decision that cited to *Mills* and the law as it was clearly established then, in 1995, not the law at the time of Banks's sentencing, that matters.

(b) Are We Compelled to Conduct a Retroactivity Analysis under Teague?

The Commonwealth also argues that we should not apply the lessons of *Mills* to Banks's case, because Banks's conviction became final before *Mills* was decided, and because the Pennsylvania Supreme Court has consistently decided that *Mills* is not retroactive. Under *Teague v. Lane*, 489 U.S. 288, 300, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), *reh'g denied*, 490 U.S. 1031, 109 S.Ct. 1771, 104 L.Ed.2d 206 (1989), retroactivity is a "threshold question," because it is in that determination that a court establishes whether a rule enunciated on the basis of a set of facts will apply only prospectively or will be applied retroactively to all who are similarly situated. *See id.* at 299-301, 109 S.Ct. 1060.[13] Retroactivity analyses can be complex, but here the analysis is not, because we do not need to focus on anything other than the reasoning and determination of the Pennsylvania Supreme Court. We acknowledge that the Pennsylvania Supreme Court has stated that it will not give retroactive effect to "new rules" handed down after a conviction has become final.[14] We acknowledge further that the

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[13] Because we find *Teague* not to govern our analysis, our discussion of its principles are limited to explaining why it is not controlling here, despite the arguments of the parties. We note, however, that recent decisions have called into question to what extent *Teague* has continued force independent of AEDPA. *See, e.g., Tyler v. Cain*, 533 U.S. 656, ____-____, 121 S.Ct. 2478, 2483-84, 150 L.Ed.2d 632 (June 28, 2001) (rejecting application of the *Teague* exceptions to construe *Cage*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) as retroactive under 28 U.S.C. § 2244(b)(2)(A)).

[14] "[A] new rule of law will not be applied retroactively 'to

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Pennsylvania Supreme Court has specifically noted its skepticism regarding the retroactive application of *Mills* to cases other than non-final sentences, *see, e.g., Commonwealth v. Cross*, 555 Pa. 603, 726 A.2d 333, 338 n. 4, (1999), and that it disagrees with our ruling in *Frey*.[15] *See Cross*, 726 A.2d at 337.

However, the ruling in *Banks II* is what determines the scope of our review, and in *Banks II*, the Pennsylvania Supreme Court held that, following its previous rulings in this area, the sentencing process did not violate *Mills*. To determine whether the Pennsylvania Supreme Court's ruling in *Banks* was contrary to, or involved an unreasonable application of, Supreme Court precedent, we do not need to undertake any retroactivity analysis, because, notably, the

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any case on collateral review unless that decision was handed down during the pendency of appellant's direct appeal and the issue was properly preserved there or . . . was nonwaivable.'" *Commonwealth v. Cross*, 555 Pa. 603, 726 A.2d 333, 338 (1999) (*quoting Commonwealth v. Gillespie*, 512 Pa. 349, 516 A.2d 1180, 1183 (1986)).

[15] The Pennsylvania Supreme Court has asserted that it has "concurrent jurisdiction" with this court "as to federal constitutional questions" and as such may "formulate its own interpretation of Supreme Court precedent, which may be in opposition to that stated by the lower federal courts." *Cross*, 726 A.2d at 338 n. 4. At the same time, the United States Supreme Court has made it clear that a federal court must apply independent judgment in its interpretation of federal law and if, "after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody . . . violates the Constitution, that independent judgment should prevail." *Williams*, 529 U.S. at 389, 120 S.Ct. 1495.

Pennsylvania Supreme Court undertook none. It examined the penalty phase on the merits based on *Mills*, making no reference to any concerns regarding *Mills*' applicability to the case. *Banks II*, 656 A.2d 470.

The government argues that if we are considering the applicability of a new rule (assuming *Mills* is a new rule -- which is not at all clear[16]), we must be guided by *Teague v.*

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[16] To the extent that *Teague* still provides the appropriate scheme for analysis, *see supra* n. 13, we note that the Sixth Circuit has explicitly found that *Mills* does not comprise a "new rule" under *Teague*. *Gall v. Parker*, 231 F.3d 265, 322 (6th Cir. 2000), *reh'g and reh'g en banc denied*; *cert. denied*, ____ U.S. ____, 121 S.Ct. 2577, 150 L.Ed.2d 739 (2001). *Accord*, *DeShields v. Snyder*, 829 F.Supp. 676, 688 (D.Del. 1993). Other courts have determined that it is immaterial whether *Mills* is a new rule, because, whether or not the rule is new, it falls within the second exception of *Teague*. *See, e.g., Williams v. Dixon*, 961 F.2d 448 (4th Cir.), *cert. denied*, 506 U.S. 991, 113 S.Ct. 510, 121 L.Ed.2d 445 (1992). The Fifth and the Eighth Circuit, in contrast, have classified *Mills* as a new rule. *See, e.g., Miller v. Lockhart*, 65 F.3d 676, 686 (8th Cir. 1995); *Cordova v. Collins*, 953 F.2d 167, 173 (5th Cir.), *cert. denied*, 502 U.S. 1067, 112 S.Ct. 959, 117 L.Ed.2d 125 (1992). Both of these cases are distinguishable, however. In *Cordova* the Fifth Circuit summarily concluded that *Teague* precluded it from applying a decision announced after Cordova's conviction was final. The court supplied no analysis nor explanation to support its conclusion. 953 F.2d at 173. In *Miller*, only one of the four significant pre-*Mills* cases had been decided by the U.S. Supreme Court prior to Miller's conviction, and that decision, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), was a plurality opinion whose fractured opinions were considered in *Miller* not to" 'compel' the further holding that a unanimity requirement for mitigating circumstances is unconstitutional." 65 F.3d at 686. The other three decisions -- that

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Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and *O'Dell v. Netherland*, 521 U.S. 151, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997), and refuse to apply such new rule unless one of the two narrow exceptions referenced in the case law applies.[17] However, we conclude that we need not explore the contours of *Mills* (and its predecessors) as to whether it

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were decided prior to Banks's conviction becoming final -- were *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (applying *Lockett* in a 5-4 decision with two concurrences); *Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (characterizing the rules that a sentencer may not be precluded from considering any "aspect of a defendant's character or record and any of the circumstances of the offense" and "that a sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence" as well established; there were six justices in the majority and three concurring); *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) (unanimously holding that mitigating evidence was wrongly excluded from consideration).

[17] The two exceptions are:

(1) "rules 'forbidding criminal punishment of certain primary conduct [and] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense'" *O'Dell v. Netherland*, 521 U.S. 151, 157, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997) (*quoting Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989));

(2) "'watershed rules' of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *O'Dell* at 157 (quoting *Graham v. Collins*, 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993), *reh'g denied*, 507 U.S. 968, 113 S.Ct. 1406, 122 L.Ed.2d 778.).

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is "new;" nor do we need to consider, as the parties have done, the applicability of the exceptions. This is because, as the brief of amici curiae notes, [18] resort to *Teague* is misplaced. *Teague* teaches that the federal courts in habeas corpus proceedings should be reluctant to apply new rules of federal jurisprudence in state court cases decided before such new rules were handed down. Principles of comity and finality counsel that we maintain a circumscribed scope of habeas review. *Teague*, 489 U.S. at 308, 109 S.Ct. 1060. Here, however, as we have noted, the Pennsylvania Supreme Court applied *Mills*. We are examining the application of *Mills*, not because we wish to impose a new rule not considered by the Pennsylvania Supreme Court, but as the court in fact *did* consider and apply it.[19] In such a situation, *Teague* is not implicated. Accordingly, we need ask only whether the Pennsylvania Supreme Court's application of *Mills* should be disturbed under the AEDPA standards.[20]

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As noted in *supra* n. 16, the Fourth Circuit has found *Mills* to fall within the second *Teague* exception.

18 Brief of Amici Curiae, The Pennsylvania Association of Criminal Defense Lawyers and Louis Natali, Esq., Supporting Appellants. We are grateful to amici for their careful reasoning and research. Their brief was thorough and expertly written; more, it was genuinely helpful.

19 As we reference below, the precise holding of the Pennsylvania Supreme Court was that "[n]either the jury instructions, the jury poll nor the verdict slips in the instant matter contained language which would violate the dictates of *Mills*." *Banks II*, 656 A.2d at 470.

20 The District Court never really addressed this issue be-

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(c) The Pennsylvania Supreme Court's Application of Mills

We disagree with the District Court's refusal to address how the Pennsylvania Supreme Court applied *Mills* in *Banks II*. We do, however, agree with the District Court that, in any event, our analysis would not be dictated by *Frey* -- which was pre-AEDPA -- but by the AEDPA standard. Thus, we must ask whether the Pennsylvania Supreme Court determination regarding the constitutionality of the instructions, verdict slip, and polling of the jury involved an unreasonable application of *Mills*.

The Pennsylvania Supreme Court relied on its own precedents to conclude that the sentencing proceedings in Banks did not violate *Mills*, dismissing each of Banks's contentions in turn. "This [jury] instruction, which mirrors the language found in the death penalty statute of our Sentencing Code, has previously been reviewed by this Court and determined not to violate *Mills*." *Banks II*, 656 A.2d at 470. "The form of verdict slip employed in the instant matter was virtually identical to that considered by this Court in *Commonwealth v. Frey* and determined not to infer to the jury a requirement of unanimity with respect to mitigating

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cause it concluded that neither *Mills* nor *Frey* should apply. However, since the parties have extensively briefed the issue before us, we will address it and decide it, rather than remanding to the District Court. *Hein v. FDIC*, 88 F.3d 210, 221(3d Cir.1996), *cert. denied sub nom. Hein v. McNeil*, 519 U.S. 1056, 117 S.Ct. 683, 136 L.Ed.2d 608 (1997) ("To the extent that we can decide these issues as a matter of law without further factual development, we serve the interests of judicial economy as well as the interests of the parties in avoiding unnecessary re-litigation.")

circumstances." *Id.* (Citation omitted). "Nor do the answers provided by the individual jurors during the poll suggest in any manner that they believed unanimity was required in finding mitigating circumstances." *Id.* The court then concluded, "In sum, neither the instructions of the court nor the printed instructions on the verdict slips nor the questions and responses of the court and jury during polling, standing alone or viewed in total, infer a requirement of unanimity which would violate the dictates of *Mills*." *Id.* at 471.

Consistently, the Pennsylvania Supreme Court relied on its own prior determinations in upholding Banks's sentencing proceedings. Our task is to review state court proceedings not to ensure the consistency of the Pennsylvania Supreme Court's application of its law, but, rather, to assure proper application of United States Supreme Court teachings. In *Williams v. Taylor*, the Supreme Court approvingly quoted the Seventh Circuit:

> Section 2254(d) requires us to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law 'as determined by the Supreme Court of the United States' that prevails.

24 529 U.S. at 387, 120 S.Ct. 1495 (*quoting Lindh v. Murphy*, 96 F.3d 856, 869 (7th Cir.1996)).

The United States Supreme Court has provided ample guidance in this area. There are two overarching themes in *Mills* that are further clarified in *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), *reh'g denied* 495 U.S. 924, 110 S.Ct. 1961, 109 L.Ed.2d 322. First, if under the sentencing scheme it is possible for jurors to agree that mitigating circumstances exist, but, because of a

lack of unanimity as to which mitigating circumstances exist, to conclude that they may not consider those circumstances, the sentencing scheme is unconstitutional. *Mills*, 486 U.S. at 374, 108 S.Ct. 1860. Second, and related to the first, the critical question is not whether a constitutional construction is possible, but whether a reasonable jury could have interpreted the instructions in an unconstitutional manner, that is, as restricting them to finding only those mitigating circumstances as to which all can agree. *Id.* at 375-76, 108 S.Ct. 1860. We conclude that the Pennsylvania Supreme Court failed to analyze the penalty phase of Banks's trial in accordance with these principles, and, as a consequence, unreasonably applied *Mills*. As Judge Padova recently pointed out in granting habeas relief in a very similar case, *Hackett v. Price*, 2001 WL 884721 (E.D.Pa. Aug. 6, 2001), the state court

> misconstrue[d] the court's task in examining for *Mills* error by focusing on the meaning of the statute rather than on the issue of jury confusion. As *Mills* instructs, it is the danger of jury misinterpretation of the statutory scheme, rather than the existence of a constitutional interpretation of the statute by the courts, that creates the *Mills* problem.

Id. at *19.

We must conclude that the Pennsylvania Supreme Court ruling involved an unreasonable application of *Mills*.[21] In fact, we conclude that the Pennsylvania Supreme Court

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[21] Banks argues that, in fact, the determination was "contrary to" *Mills*, because it violated *Mills*' dictates. We think the better analysis, since the Pennsylvania Supreme Court referenced *Mills*

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ruled that there was no *Mills* violation without ever really applying the teachings of *Mills*, and by examining the statute, not the potential for confusion by jurors in what they were told to do. Further, as noted in *Hackett*, *Mills* itself involved a situation in which the statute had been interpreted to be constitutional, but the Supreme Court vacated the sentence based on the risk of confusion. *Id.* at 19.

We will examine each aspect of the Pennsylvania Supreme Court's analysis of the jury's involvement in the penalty phase -- the instructions themselves, the verdict slip, and the polling of the jury following the sentencing verdict.

i. Jury Instructions

In *Banks II*, the Pennsylvania Supreme Court quoted three lines of the jury instructions:

> The sentence you impose will depend upon your findings concerning aggravating and mitigating circumstances. The Crime[s] Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances. The verdict must be a sentence of life imprisonment in all other cases.

656 A.2d at 470.

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and seemed to be considering how it impacted the Banks case, is to rely on the "unreasonable application," which, in any event, is clearly evident.

The court then opined that because the instruction "mirrors the language found in the death penalty statute of our Sentencing Code [that] has previously been reviewed by this court and determined not to violate Mills" Banks's claim was "without merit." *Id.*[22] (*citing Commonwealth v. Hackett*, 534 Pa. 210, 627 A.2d 719 (1993); *Commonwealth v. Marshall*, 534 Pa. 488, 633 A.2d 1100 (1993), *rearg. denied* (1994); *Commonwealth v. O'Shea*, 523 Pa. 384, 567 A.2d 1023 (1989), *cert. denied*, 498 U.S. 881, 111 S.Ct. 225, 112 L.Ed.2d 180 (1990)).

In *Hackett*, the Pennsylvania Supreme Court had attempted to distinguish *Mills* based on the Maryland statute, reasoning that since the Maryland statute barred consideration of mitigating evidence unless there was unanimous agreement and the Pennsylvania statute required unanimity as to the absence of a mitigating circumstance, the Pennsylvania statute allowed individual jurors to prevent death sentences but not to compel them. *See Hackett*, 2001 WL 884721 at *19. The differences in the statutes were not enough to render the Pennsylvania statute constitutional, since the danger of jury misinterpretation was present in both statutes, and the Pennsylvania Supreme Court had examined only the statute, not the possibility that the jury had been confused by the instructions given. *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), *reh'g denied* 495 U.S. 924, 110 S.Ct. 1961, 109 L.Ed.2d 322, established that the jury instructions must be considered in the context of the

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22 *Hackett*, as noted above, was recently vacated by the Eastern District of Pennsylvania. *See* 2001 WL 884721. Post-conviction relief was denied in *O'Shea* in 1999 at 556 Pa. 6, 726 A.2d 376, *cert. denied*, 528 U.S. 1119, 120 S.Ct. 941, 145 L.Ed.2d 818 (2000).

entire proceeding, and the Pennsylvania Supreme Court's failure to do so was contrary to clearly established federal law. *Id.* at 21. Here, the Pennsylvania Supreme Court has essentially ignored the teachings of *Boyde* and engaged the same reasoning regarding the constitutionality of the instructions as in *Hackett* -- itself constitutionally defective.

Proper application of *Mills* requires at the outset that the reviewing court examine the entire jury instructions, posing the "critical question" whether a reasonable jury could have concluded from the instruction that unanimity was required to find a mitigating circumstance. *Mills*, 486 U.S. at 370, 108 S.Ct. 1860. Also, the Boyde standard requires that the court view the instruction in its totality, not examine in isolation a few sentences that reference the Crimes Code. *Boyde*, 494 U.S. at 378, 110 S.Ct. 1190.

In *Boyde*, the Supreme Court iterated the standard of evaluating jury instructions as "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence," *Id.* at 380, 110 S.Ct. 1190, and it reiterates the *Mills* principle that jury instructions must be carefully considered in their entirety. *Mills*, 486 U.S. at 384, 108 S.Ct. 1860. "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Boyde*, 494 U.S. at 378, 110 S.Ct. 1190. In *Banks II*, the Pennsylvania Supreme Court never examined the jury instruction from that vantage point. Rather, it looked at one part of the instruction and found that it was acceptable because it tracked the permissible statutory provisions and did not "infer" a requirement of unanimity. 656 A.2d at 470. Its conclusion was based not on how a juror might interpret its content, but on its own previous statutory construction of the language at issue. Here, even

more starkly than in *Hackett*, the Pennsylvania Supreme Court merely stated that the statutory language had been reviewed and "determined not to violate Mills." *Banks II*, 656 A.2d at 470. There was no further analysis.

We will juxtapose the instructions given by the trial court with those we found in *Frey* to be constitutionally defective.

Frey Instructions	**Banks Instructions**
Members of the jury, you must now decide whether this defendant should be sentenced to death or life imprisonment. The sentence will depend on your finding concerning aggravating and mitigating circumstances. The Crimes Code provides that the verdict must be a sentence of death if the jury unanimously finds one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life in all other cases. *Frey v. Fulcomer*, 132 F.3d 916, 922 (3d Cir.	Members of the jury, you must now decide whether the defendant in this case is to be sentenced to death or to life imprisonment on each of the Informations upon which you have returned a verdict of guilty of murder in the first degree. The sentence you will impose will depend on your findings concerning aggravating and mitigating circumstances. The Crimes Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances, or if the jury unanimously finds one or more aggravating circumstances which outweigh

1997), *cert. denied*, 524 U.S. 911, 118 S.Ct. 2076, 141 L.Ed.2d 151 (1998).

Remember that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstances (sic) and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment. *Id.*

Now, the Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt . . . The defendant has the burden of proving mitigating circumstances but only by a preponderance of the evidence. *Id.* at 923.

any mitigating circumstance or circumstances.

Remember, under the law of this Commonwealth, your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstance, or if you unanimously find one or more aggravating circumstances which then outweigh any mitigating circumstances.

In all other cases, your verdict would be life imprisonment.

Once again, the Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. The defendant has the burden of proving mitigating circumstances by a preponderance of the evidence.

If, after conscientious and thorough deliberations, you are unable to agree on your findings and your verdict, you should report that to me.

While, as we have noted, *Frey* does not control our holding here, nonetheless our reasoning there regarding the *Mills* implications of a very similar jury charge is instructive and applicable.[23] As we said in *Frey*:

> Specifically, we must determine whether it is reasonably likely that the jury could have understood the charge to require unanimity in consideration of mitigating evidence. We need not determine whether the jurors *did*, in fact, understand the charge to require unanimity in consideration of mitigating evidence-only whether it was reasonably likely. *See Boyde*, 494 U.S. at 380, 110 S.Ct. at 1197-98; *Mills*, 486 U.S. at 384, 108 S.Ct. at 1870.
>
> Examining the language of the jury charge, we must answer in the affirmative. First and foremost, read in its entirety, the relevant portion of the jury charge emphasizes the importance of a unanimous finding, using the phrase frequently and in close proximity to -- within seven words of -- the mitigating circumstances clause. We describe the relevant portion of the sentence: "if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance. . . ." Considering this close proximity -- the clause is, to the ear and to the mind, one sound bite -- it is quite possible that a juror would, regardless of other qualifying language, believe that mitigating circumstances had to be found unanimously.

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[23] In his brief Banks sets out the jury instruction in *Frey* alongside those given here, and notes that the instruction given here was even more egregious than in *Frey* in terms of its import regarding the need for the jurors to "agree" on their" findings." We agree.

* * *

Thus, the unanimity language in the Frey charge could only modify the term "find," and hence the jury could reasonably have believed that unanimity was required in *both* its ultimate and interim conclusions, especially given the close proximity we have described.

* * *

Other parts of the Frey charge were more likely to increase the confusion rather than lessen it. As in *Zettlemoyer*, the Frey trial court made a point of instructing the jury on the relevant burdens of proof relating to both aggravating and mitigating circumstances.

* * *

> [But] Unlike *Zettlemoyer*, where the court specifically instructed the jury that aggravating circumstances must be proven "unanimously, beyond a reasonable doubt," the trial court here did not stress that the different burdens that attach to aggravating and mitigating circumstances also entail different unanimity requirements. A lay jury might plausibly conclude, therefore, that aggravating *and* mitigating circumstances must be discussed and unanimously agreed to, as is typically the case when considering whether a burden of proof has been met. Such an understanding, however, is plainly inconsistent with the requirements of *Mills*, and adds to our concern that the jury could have understood the charge to require unanimity in consideration of mitigating evidence.

132 F.3d at 923-24.

These same concerns dictate the same result here. The instruction here, like the one we examined in *Frey*, runs afoul of *Mills*, and the Pennsylvania Supreme Court's assessment of the instruction involved an unreasonable application of *Mills*. The instructions are in themselves ambiguous, allowing for a jury to infer that the requirement of unanimity applies both to aggravating and mitigating circumstances. There is no way that a juror would understand that a mitigating circumstance could be considered by less than all jurors. Further, when the judge clarified the difference between aggravating and mitigating circumstances, he described the requirements for finding aggravating circumstances and then said:

> The defendant has the burden of proving mitigating circumstances by a preponderance of the evidence. The preponderance of the evidence is a lesser burden of proof than beyond a reasonable doubt. A preponderance of the evidence exists where one side is more believable than the other or, as has been explained to you, a preponderance exists whenever the scales tip ever so slightly.

A reasonable juror could readily infer from the fact that the distinctions between the burden of proof were explained, but no mention was made of a distinction between a requirement of unanimity for a finding of aggravating circumstances and the requirement for mitigating circumstances, that the same requirement of unanimity applied. The Banks court went on to stress:

> Remember, again, your verdict in each case must be unanimous. It cannot be reached by a majority vote or by any percentage. It must be the verdict of each and every one of you.

Considered as a whole, the jury instructions leave no doubt that "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380, 110 S.Ct. 1190.

ii. Verdict Slip

In its review of the verdict slip, the Pennsylvania Supreme Court noted that the form of slip used was "virtually identical to" the one the court had considered in *Commonwealth v. Frey* and had "determined not to infer to the jury a requirement of unanimity with respect to mitigating circumstances." *Banks II*, 656 A.2d at 470. It therefore rejected as "unfounded" Banks's claim that the verdict slip "impermissibly suggested to the jury that it must find mitigating circumstances by unanimous vote." *Id.*

The Pennsylvania Supreme Court then reviewed the poll by the foreman but determined that, because both the oral instructions and the instructions on the verdict slip were proper, the situation was distinguishable from *Commonwealth v. Young*, 524 Pa. 373, 572 A.2d 1217 (1990), *resentencing after remand aff'd*, 36 Conn.App. 516, 651 A.2d 1313 (1993), *cert. denied*, 511 U.S. 1012, 114 S.Ct. 1389, 128 L.Ed.2d 63 (1994), in which the court had remanded for resentencing a case in which the oral instructions were inconsistent with the verdict sheet. *See Banks II*, 656 A.2d at 471. In *Young*, the jury charge required a sentence of death if "the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances." *Young*, 572 A.2d at 1228. The verdict sheet, however, indicated that "We, the jury, unanimously find that the defendant has proven the following

mitigating circumstances by a preponderance of the evidence." *Id.* (Emphasis in original). The Pennsylvania Supreme Court found that "[t]his inconsistency requires a remand of this case for resentencing. . . ." *Id.* In contrast, in *Banks II*, the Pennsylvania Supreme Court found nothing in the verdict slip questions, or the jurors' responses, that would "indicate they believed they had to find mitigating circumstances unanimously." 656 A.2d at 471.

But, again, the court undertook a different inquiry from that required under *Mills*. *Mills* requires a court to assess whether a need for a unanimous finding of mitigating circumstances is one that "a reasonable jury could have drawn from . . . the verdict form employed." *Mills*, 486 U.S. at 375-76, 108 S.Ct. 1860.

Here, we cannot help but find that a reasonable juror could so conclude. In fact, we believe the form itself *does* suggest the need for unanimity. The verdict form is a three-page document, containing two "numbered" statements:

> 1. We the jury unanimously sentence the defendant in the above matter to
>
> X Death
> ___ Life Imprisonment
>
> 2. (To be completed if the Sentence is Death) ***We the jury have found unanimously*** (emphasis added)
>
> ___ At least one aggravating circumstance and no mitigating circumstances. The aggravated circumstance(s) (is)(are):

1. ___ In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

2. ___ The defendant has a significant history of felony convictions involving the use or threat of violence to the person.

3. ___ The defendant has been convicted of another federal or state offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

Or

X One or more aggravating circumstances which outweigh any mitigating circumstance or circumstances.

The aggravating circumstance(s) (is)(are):

1. ___ In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

2. ___ The defendant has a significant history of felony convictions involving the use of threat of violence to the person.

3. X The defendant has been convicted of another federal or state offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

The mitigating circumstance(s) (is)(are):

1. X The defendant was under the influence of extreme mental or emotional disturbance.

2. ___ The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

3. ___ Any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense.

Each form was marked as shown above and signed by the foreperson of the jury.

We find it only reasonable to conclude that the form itself is at least confusing, and more likely suggestive, regarding the need for unanimity as to mitigating circumstances. The lead-in language to the overarching second question is "We the jury have found unanimously. . . ." By implication, everything that follows was found unanimously. What follows is a reference both to aggravating and to mitigating circumstances, with no additional language that would imply that there is a different standard for aggravating

circumstances than there is for mitigating circumstances. There is also no language anywhere on the form from which the jury could infer that a mitigating circumstance might be marked if only one juror had found that circumstance to exist.

Thus, the structure and form of the verdict slip itself runs afoul of the dictates of Mills. Further, for the Pennsylvania Supreme Court to have ruled that there was no Mills violation without an examination of the content and implications of the verdict slip and without employing the proper inquiry was an unreasonable application of Mills.

iii. Jury Poll

Of the three elements -- the instructions, the verdict slip, and the jury poll -- the Pennsylvania Supreme Court opinion devoted the greatest attention to the polling of the jury, actually quoting the trial court's words. The polling questions and answers never used the term "unanimous" regarding the verdict or the finding of any of the aggravating or mitigating circumstances. While the jurors were asked whether they each found the "same" circumstances as the ones referred to before, it is difficult to say whether the questions were confusing in this regard. We do agree with the Pennsylvania Supreme Court in its view that the polling of a jury can compound the problem created by a questionable charge or verdict slip, as was the case in *Young*. *Banks II*, 656 A.2d at 471. Here, the polling does not appear either to add to or reduce the confusion as to the *Mills* problems we have already identified in the penalty phase instructions and verdict slip.

C. CONCLUSION

Because the Pennsylvania Supreme Court ruling regarding the application of *Mills* to the penalty phase instruction and verdict slip in Banks's trial was unreasonable, habeas relief will be granted and we will REVERSE the Order of the District Court and instruct it to GRANT a provisional writ of habeas corpus directed to the penalty phase. The Commonwealth of Pennsylvania may conduct a new sentencing hearing in a manner consistent with this opinion within 120 days of this Order, or shall sentence Banks to life imprisonment.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

GEORGE E. BANKS, Petitioner	:	NO. 4:CV-99-0438 (Jugde McClure)
v.	:	
MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; JAMES E. PRICE, Superintendent of State Correctional Institution at Greene: and RAYMOND COLLERAN, Superintendent of State Correctional Institute at Waymart; COMMONWEALTH OF PENNSYLVANIA, Respondents	:	

ORDER

FILED: September 16, 1999

BACKGROUND:

On March 22, 1999, petitioner George E. Banks, an inmate at the State Correctional Institution at Waymart, Wayne County, Pennsylvania, commenced this action with the filing of a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Banks was convicted in 1983 of twelve counts of first-degree murder, one count of third-degree murder, one count of attempted murder, and one count of robbery. Twelve consecutive sentences of death, plus a consecutive sentence of 25 to 50 years total incarceration,

were imposed by the Court of Common Pleas of Luzerne County, Pennsylvania.

Banks has been granted leave to proceed *in forma pauperis*, counsel has been appointed, and a stay of a previously scheduled execution has issued.

On March 31, 1999, on initial review under Rule 4 of the Rules Governing Section 2254 Cases in the U.S. District Courts, 28 U.S.C. following § 2254, we issued a rule to show cause why four of Banks' claims should not be dismissed as procedurally barred. By Memoraum and Order of Court dated May 7, 1999, we dismissed those four claims as procedurally barred. *See Banks v. Horn*, 49 F. Supp. 2d 400 (M.D. Pa. 1999). Banks withdrew a claim in his brief in support of the petition. On August 18, 1999, we issued a memorandum and order denying the petition. *Banks v. Horn*, 1999 WL 636595 (M.D. Pa. Aug. 18, 1999).

Before the court is Banks' motion for reconsideration of the latter memorandum and order.

DISCUSSION:

I. STANDARD

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985) (citations omitted), *cert. denied*, 476 U.S. 1171 (1986). "Therefore, a court may properly grant a party's motion for reconsideration in any of the following circumstances: '(I) the development of any intervening change in the law, (2) the emergence of new evidence not previously available, or (3) the need to correct a clear error of law or

prevent a manifest injustice.'" *In re TMI Litigation Cases Consolidated II*, 922 F. Supp. 997, 1008 (M.D. Pa. 1996) (Rambo, then C.J.; quoting *Cohen v. Austin*, 869 F. Supp. 320, 321 (E.D. Pa 1994); citations omitted in *In re TMI*). The granting of a motion to reconsider is an extraordinary remedy and a court should not do so when the motion is merely a re-styling or rehash of issues previously presented. *McConocha v. Blue Cross and Blue Shield Mutual of Ohio*, 930 F. Supp. 1182, 1184 (N.D. Ohio 1996). A court should consider neither new evidence nor a new legal theory which could have been presented on the original motion, taking into account due diligence. *Id.* Mere disagreement with the court is a ground for an appeal, not a motion for reconsideration. *Id.*

II. ISSUE AS TO WHICH RECONSIDERATION IS SOUGHT

The issue as to which Banks seeks reconsideration is the ground of relief numbered (6) in his petition:

> The trial court's instructions to the jury in the sentencing phase, the verdict slip, and the jury poll required the jury to unanimously find both aggravating and mitigating circumstances in violation of the defendant's Eighth Amendment right to protection from cruel and unusual punishment.

See 1999 W.L. 636595 at *1. The principle underlying this claim is the holding of *Mills v. Maryland*, 486 U.S. 367 (1988). *See also McKoy v. North Carolina*, 494 U.S. 433 (1990).

In *Frey v. Fulcomer*, 132 F.3d 916, 924 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 2076 (1998), the Third Circuit

reviewed a jury charge similar to that challenged by Banks and concluded that it violated the rule of *Mills*. In our previous memorandum, we concluded that *Frey* does not apply because it involved a petition filed before the amendments to § 2254 under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214.[1] Under AEDPA, habeas relief is warranted if the state court decision resulted in a decision that was contrary to, or involved an unreasonable application of clearly established precedent of the Supreme Court of the United States. 1999 WL 636595, at *16 (citing 28 U.S.C. § 2254(d)(1)[]). Since *Mills* was decided in 1988, and Banks was convicted in 1983, we concluded that the rule of *Mills* was not clearly established at the time that the state court made its ruling on the issue.

III. REVIEW OF THE ISSUE

Banks may be correct, at least in part, as to the time of the state court decision. The applicable statutory provision reads:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in

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[1] We held that the standards recited in AEDPA govern Banks' petition. Banks argued that because he filed a petition before AEDPA became effective (that petition was dismissed as a mixed petition as directed by the Third Circuit), pre-AEDPA standards governed the instant petition. The Third Circuit since has held that AEDPA governs in such circumstances. *Hull v. Kyler*, No. 97-7551, slip op. at 22-24 (3d Cir. filed Aug. 23, 1999).

State court proceedings unless the adjudication of the claim --

> (1) resulted in a decision that was contrary to or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;
>
> . . .

28 U.S.C. § 2254(d)(1).

The question is the time at which the federal law must have been clearly established, at the time of the "adjudication" or the time of the "decision." An attempt to answer this question involves opening a can of worms, and those worms are remarkably squiggly.

One reading of this language would lead one to conclude that the "decision" is the holding after "adjudication on the merits" of the constitutional issue, meaning that the time of the "decision" would be the same as the time that the "adjudication on the merits" is complete. However, one also can read "decision" to mean the final judgment. Given the overall purpose of AEDPA to limit the scope of federal review of the final judgments of state courts, this reading becomes more reasonable.

Yet another reading of "decision" is the ruling made by the first court considering the issue at the time it must be raised. In this instance, that could be the trial judge's ruling on the jury charge, verdict slip, and jury poll; if an erroneous ruling at that time constitutes plain error, it could be (again) the time the judgment becomes final.

This case is an example of why one of these alternate readings of "decision" is reasonable. The issue was not raised in the state courts (via PCRA petition) until February of 1989. *Commonwealth v. Banks*, 656 A.2d 467, 469 (Pa. 1995) (citations for subsequent history omitted). The Supreme Court of Pennsylvania ruled on the issue in 1995. *Id.* at 470-472. Yet Banks' argument brings the applicable time frame forward twelve years from the time that the trial court should have been presented with the issue and eight years after the judgment became final by the denial of *certiorari* by the Supreme Court of the United States.

Complicating this analysis is whether an erroneous holding in 1995 would mean that the sentence of death in 1983 violated the Constitution. That is, the Supreme Court decided *Mills* in 1988, after Banks' judgment became final. *Mills* therefore would mean that Banks' sentence was unconstitutional only if *Mills* was retroactive. Thus, the Supreme Court of Pennsylvania's application of *Mills*, if erroneous, would not necessarily render the sentence unconstitutional.

Fortunately, we need not immerse ourselves in the squiggly worms. As we noted, 1999 WL 636595 at *17, *Mills* does not require an outcome different from that reached by the state courts. Since a number of courts have ruled that language substantially similar (in some cases, nearly identical) to that used in the challenged jury instruction, does not violate the rule of *Mills*, we concluded that the state courts' decision was not an unreasonable application of Supreme Court precedent. 1999 WL 636595 at *15-*16.

Banks cites *Jermyn v. Horn*, 1998 WL 754567 (M.D. Pa. Oct. 27, 1998) (Caldwell, J.; currently before the Third Circuit); as conflicting with our decision. He is correct, but again, only to a certain extent. In that case, reviewing

language substantially similar to that involved in this case, Judge Caldwell concluded that the respondents had not persuaded him that the state court adjudication was a reasonable application of *Mills* and *McKoy*. *Jermyn* at *45. However, he also noted:

> The respondents maintain that the state supreme court's decision is a reasonable application of United States Supreme Court law in this area. However, they cite no Supreme Court precedent dealing with the jury instructions at issue nor do they cite cases from other Circuits that might be contrary to the Third Circuit's decision in *Frey*.

Id. at *44. In this case, we have cited (albeit as products of our own research) a number of such opinons.[2] Otherwise, we join the Supreme Court of Pennsylvania and the other courts we cited on the issue and simply disagree with Judge Caldwell on the issue.

In short, the motion for reconsideration will be denied, since it reflects disagreement with our holding, not a change in the law, new evidence, or plain error of law.

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[2] One case cited by Judge Caldwell for purposes of the issue of retroactivity is *DeShields v. Snyder*, 829 F. Supp. 676 (D. Del. 1993), which the Third Circuit called a "thoughtful opinion" in *Frey*. *Jermyn* at *37 (citing *Frey* at 920 n. 4). *DeShields* is one of the opinions we cited as having a similar instruction as the one at issue in this case.

NOW, THEREFORE, IT IS ORDERED THAT petitioner George E. Banks' motion (record document no. 26) for reconsideration is denied.

/s/
James F. McClure, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

GEORGE E. BANKS, Petitioner	:	NO. 4:CV-99-0438
v.	:	
MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; JAMES E. PRICE, Superintendent of State Correctional Institution at Greene: and RAYMOND COLLERAN, Superintendent of State Correctional Institute at Waymart; COMMONWEALTH OF PENNSYLVANIA, Respondents	:	

MEMORANDUM

McCLURE, District Judge — August 18, 1999

BACKGROUND:

On March 22, 1999, petitioner George E. Banks, an inmate at the State Correctional Institution at Waymart, Wayne County, Pennsylvania, commenced this action with the filing of a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. According to the petition, Banks was convicted in 1983 of twelve counts of first-degree murder, one count of third-degree murder, one count of attempted murder, and one count of robbery. Twelve consecutive sentences of death, plus a consecutive sentence of 25 to 50 years

total incarceration, were imposed by the Court of Common Pleas of Luzerne County, Pennsylvania.

Banks has been granted leave to proceed *in forma pauperis*, counsel has been appointed, and a stay of a previously scheduled execution has issued.

On March 31, 1999, on initial review under Rule 4 of the Rules Governing Section 2254 Cases in the U.S. District Courts, 28 U.S.C. following § 2254, we issued a rule to show cause why four of Banks' claims should not be dismissed as procedurally barred. By Memorandum and Order dated May 7, 1999, [1] we dismissed those four claims as procedurally barred. In his brief, Banks has withdrawn his eighth claim. Brief in Support of Petition for Writ of Habeas Corpus at 14.

The remaining grounds for relief asserted by Banks, numbered as in the petition, are:

(1) The defendant did not effect a knowing, intelligent and voluntary waiver of his Sixth Amendment right to assistance of counsel.

(2) The defendant was not competent to waive his Sixth Amendment right to assistance of counsel.

(3) The defendant did not effect a knowing, intelligent and voluntary waiver of his Fifth Amendment right against self-incrimination.

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[1] To be published as *Banks v. Horn*, 49 F.Supp.2d 400 (M.D.Pa.1999), and currently available at 1999 WL 288531.

(4) The defendant was not competent to waive his Fifth Amendment right to protection from self-incrimination.

(5) The defendant was not competent to be tried, convicted and sentenced to death.

(6) The trial court's instructions to the jury in the sentencing phase, the verdict slip, and the jury poll required the jury to unanimously find both aggravating and mitigating circumstances in violation of the defendant's Eighth Amendment right to protection from cruel and unusual punishment.

(10) Pennsylvania's proportionality review statute deprives a defendant of due process of law under the Fourteenth Amendment.

The parties were provided with a briefing schedule, and all briefs have been submitted. The matter is now ripe for disposition.

Banks also has filed a motion to amend the petition to add a claim that he is not competent to be executed. The motion will be denied because, as Banks himself notes, it is not ripe for adjudication. Also, the claim has not been exhausted. The claim therefore is subject to dismissal and amendment would be futile. The motion to amend the petition will be denied.

DISCUSSION:

I. STATEMENT OF FACTS[2]

On the evening of September 24, 1982, Banks attended a birthday party in Wilkes-Barre. He was accompanied to the party by two girlfriends, and a third girlfriend was in attendance as well. Banks was at the party from approximately 9:00 until about 10:30 p.m. Between midnight and 1:00 a.m. of September 25, 1982, Banks called the location of the party and spoke to one of his girlfriends, Dorothy Lyons. Lyons was visibly upset by the call and left the party, accompanied by the last of Banks' girlfriends still in attendance. She took with her an AR-15 rifle belonging to Banks, apparently at Banks' request. The Colt AR-15 rifle is a military style, semi-automatic weapon, a civilian version of the M-16 used by American servicemen.

Shortly after 1:00 a.m., Banks was seen at a complex in which Lyons had an apartment. He was carrying a bag containing several small boxes, and commented to the witness who saw him that he (the witness) should not surprise people because he might get shot.

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[2] This summary of the facts is that set forth in an earlier memorandum, when this case was before this court initially. *Banks v. Horn*, 939 F.Supp. 1165, 1169-1170 (M.D.Pa. 1996). We repeat the statement because, obviously, the facts have not changed. A more thorough recitation of the facts is set forth in the first opinion of the Supreme Court of Pennsylvania in this matter. *Commonwealth v. Banks*, 513 Pa. 318, 324-335, 521 A.2d 1, 3-9 (1987). This case has a complicated procedural history, recited below. For the sake of simplicity, subsequent history is not provided in citations to prior related opinions.

Banks was next seen on Schoolhouse Lane in Wilkes-Barre by a group of young people on the street. (Although referred to as "teenagers" by the Supreme Court of Pennsylvania, only one of the members of this group can have been a teenager at the time of the shootings. The two victims were aged 23 and 24, and a woman who was not shot was 21 at the time of trial. The remaining person present (a man) was 20 at the time of trial.) Banks owned a home at 28 Schoolhouse Lane in which noises like gunshots were heard by the youths at about 2:00 a.m. Banks appeared on the street wearing coveralls which witnesses consistently described as appearing to be of a military appearance. One of the youths stated that he knew Banks, to which Banks responded that he was "not going to live to tell anybody about this," and shot two of the youths. One of them survived but the other was pronounced dead later that morning.

When police were summoned to the scene, they called for an ambulance. Also, they were told about the sound of gunfire from 28 Schoolhouse Lane and went there to investigate. Inside they found the lifeless bodies of the three girlfriends of Banks who had been at the party as well as their five children, four of whom were fathered by Banks. All had gunshot wounds.

Banks was next seen in the vicinity of a lounge called the Cabaret. Two men were in their cars talking when Banks approached, in the same outfit, and pointed the AR-15 at the head of one of the men. Banks demanded that the man move over and got into the car. Banks let the owner out after a short distance but left with the car.

At about 2:30 a.m. shots were heard at the Heather Highlands Trailer Park in Jenkins Township, Luzerne County. Two boys present in one of the trailers described

how Banks entered the trailer and grabbed Sharon Mazzillo (another girlfriend) with one arm while holding the AR-15 in the other. Banks said something like, "I shot some of my family, now I'm going to shoot some of yours." He then shot his son by Sharon, Kissmayu Banks, who was asleep on the couch. Sharon and her mother, Alice Mazzillo, then tried to push Banks out of the trailer, and Alice went to the bedroom to call police. Banks shot Sharon as she tried to run out the door of the trailer. Banks next choked, shot and kicked Scott Mazzillo, then struck him with the butt of the rifle. Finally, Banks shot Alice and left. One of the two boys left alive by Banks lifted the phone from Alice's body and completed the call to the police.

Banks later was tracked to his mother's home, but left before police arrived. Eventually, Banks was located in the home of a friend, having barricaded himself inside. Police surrounded the house but did not enter since Banks still had the AR-15 and was suspected of having hand grenades. Police tried to convince Banks that his children were still alive and needed his help. After more than four hours, Banks was talked out of the house and taken into custody. He made numerous statements admitting to the shootings.

Explaining conduct like that of Banks probably can never be done adequately. At trial, the Commonwealth took the position that Banks was motivated by a fear that he was losing control over his "family." Defense counsel presented psychiatric experts who testified that Banks suffered from paranoid psychosis. Succinctly stated, the experts testified that Banks, who is biracial, believed that he was the victim of a racist conspiracy. There was evidence also that Banks had made statements to the effect that he did not want his children to grow up in a racist world, and killed them to save them from suffering the effects of racism as Banks had.

II. PROCEDURAL HISTORY

As indicated above, *see* Note 2, this case has been before this court previously. To place the matter into context, since the resolution of Banks' claims is affected, we will provide a procedural history of the case. A chronology of some of the more important events of this case is appended to this opinion as Court's Appendix I.

After Banks was convicted in the Court of Common Pleas of Luzerne County, he pursued a direct appeal to the Supreme Court of Pennsylvania, which affirmed. *Commonwealth v. Banks*, 513 Pa. 318, 521 A.2d 1 (1987) (*Banks I*). The Supreme Court of the United States denied a petition for certiorari. *Banks v. Pennsylvania*, 484 U.S. 873, 108 S.Ct. 211, 98 L.Ed.2d 162 (1987). Banks then sought post-conviction, collateral relief in the Court of Common Pleas under the Pennsylvania Post Conviction Hearing Act which was considered under the Post Conviction Relief Act (PCRA), 42 Pa.Cons.Stat.Ann. §§ 9541 et seq., which had become effective; the denial of relief was affirmed by the Supreme Court of Pennsylvania. *Commonwealth v. Banks*, 540 Pa. 143, 656 A.2d 467 (1995) (*Banks II*). The Supreme Court of the United States again denied a petition for certiorari. *Banks v. Pennsylvania*, 516 U.S. 835, 116 S.Ct. 113, 133 L.Ed.2d 65 (1995).

After Pennsylvania Governor Thomas Ridge signed a death warrant for execution during the week of March 3, 1996, Banks filed with this court, *inter alia*, a motion to stay execution. We granted that motion and Banks filed a petition for a writ of habeas corpus under § 2254. We denied a motion to dismiss the petition as a mixed petition, finding that unexhausted claims were procedurally barred in the Pennsylvania courts. *Banks v. Horn*, 928 F.Supp. 512

(M.D.Pa. 1996) (*Banks III*). *See also Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) (mixed petition is one with both exhausted and unexhausted claims, and must be dismissed); *Toulson v. Beyer*, 987 F.2d 984 (3d Cir. 1993) (if unexhausted claims are procedurally barred in state court, district court must dismiss unexhausted claims and consider merits of exhausted claims, but state law must clearly foreclose consideration of unexhausted claims). We then considered the merits of Banks' remaining claims and denied the petition. *Banks v. Horn*, 939 F.Supp. 1165 (M.D.Pa. 1996) (*Banks IV*).

The Third Circuit reversed and remanded for dismissal of the petition as mixed, finding that Pennsylvania law did not clearly foreclose consideration of the unexhausted claims. *Banks v. Horn*, 126 F.3d 206 (3d Cir. 1997) (*Banks V*). While the case was pending before the Third Circuit, Banks filed a second petition under the PCRA in the Court of Common Pleas, which denied relief. The Supreme Court of Pennsylvania affirmed the denial of relief, not for the reasons recited by the Court of Common Pleas, but instead finding that the second petition was time-barred under the amended version of the PCRA. *Commonwealth v. Banks*, 726 A.2d 374 (Pa. 1999) (*Banks VI*).

After Governor Ridge again signed a death warrant, Banks brought the instant petition under § 2254, and a stay of execution again has issued. As noted above, *see* "BACKGROUND" and *Banks v. Horn*, 49 F.Supp.2d 400 (M.D.Pa. 1999) (*Banks VII*), we have dismissed four of Banks' claims as procedurally barred under state law, and the petition no longer is a mixed petition.

III. TIMELINESS

Respondents argue that Banks' petition is untimely under the one-year limitations period permitted for bringing a § 2254 petition after passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, 110 Stat. 1214. The relevant provision reads:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

According to respondents, Banks' judgment of conviction and sentence became final in 1987, when the Supreme Court of Pennsylvania affirmed on direct appeal and the Supreme Court of the United States denied certiorari. In *Burns v. Morton*, 134 F.3d 109 (3d Cir. 1998), however, the Third Circuit held that petitioners must be afforded at least one year from the effective date of AEDPA before § 2244(d)(1) will bar the petition because they did not have notice of the limitation until AEDPA's effective date. Thus, the limitations period within which Banks was required to file a petition did not begin until at least April 24, 1996.

In addition, the Third Circuit has held that the time limit established by § 2244(d)(1) is a statute of limitations subject to equitable tolling. *Miller v. N.J. State Dept. of Corrections*, 145 F.3d 616 (3d Cir.1998).

On April 24, 1996, there were proceedings already pending in this court, and the matter went to the Third Circuit. The Third Circuit issued its opinion remanding to this court on September 19, 1997 (*Banks V*); we received a certified copy of the Third Circuit's judgment on October 17, 1997, and dismissed the action pursuant to that judgment on October 24, 1997. We think it evident that the time before October 24, 1997, is excluded from the period of limitations because a petition actually was pending in federal court

during that time. The proceedings related to Banks' second PCRA petition were pending when the Third Circuit issued its order remanding for dismissal. Those proceedings ended when the Supreme Court issued its opinion, *Banks VI*, on March 2, 1999. The instant proceedings began on March 22, 1999.

Respondents rely on *Lovasz v. Vaughn*, 134 F.3d 146 (3d Cir. 1998), in which the Third Circuit considered the tolling provision of § 2244(d)(2). Under that provision, the period during which a "properly filed" petition for collateral review is pending is not counted for purposes of § 2244(d)'s limitations period. The question becomes, then, whether the limitations period was tolled after the prior case in this court was dismissed and during the pendency of Banks' second PCRA petition, or between October 24, 1997, and March 2, 1999. More succinctly and directly stated, was Banks' second PCRA petition "properly filed"? According to respondents, it was not, because a petition must be timely to be properly filed. *Lovasz* at 147.

In our memorandum issued May 7, 1999 (*Banks VII*), we discussed the adequacy of the state grounds barring consideration of the four unexhausted claims asserted by Banks. 49 F.Supp.2d 400, 403-06. We noted that a ground is inadequate if, at the time an action must be taken by the petitioner to preserve a claim or claims, the rule is not clearly established. *Id.* at 403-04. If a rule is changed without notice to potential petitioners and bars consideration in state court of a claim which could have been considered prior to the change, such as by changing the time at which a claim must be raised after that time has passed, the ground is not adequate to support the judgment. *Id.* at 404-05 (relying on *Ford v.*

Georgia, 498 U.S. 411, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991)).[3]

There are two important points to consider in reviewing respondents' argument. First, although the statute reviewed by the Supreme Court in *Banks* VI, 42 Pa.Cons. Stat.Ann. § 9545, is captioned "Jurisdiction and proceedings," it is not entirely clear that the subsection setting forth the time limit for filing a PCRA petition and exceptions thereto is intended to be jurisdictional in nature. The first subsection states that original jurisdiction is in the Court of Common Pleas. Sec. 9545(a). The third subsection puts a limit on the jurisdiction of the state courts to issue a stay of execution, using standard jurisdictional language ("No court shall have the authority..."). Sec. 9545(c). The fourth subsection sets forth standards governing admissibility of evidence, discovery, and privilege during and relating to an evidentiary hearing. Sec. 9545(d). The latter normally are not considered jurisdictional matters

In contrast, the limitations subsection states that a petition "shall be filed within one year of the date the judgment becomes final, . . ." with certain exceptions. Sec. 9545(b)(1).[4] The subsection does not state that no court will have the authority to entertain an untimely petition. Thus,

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[3] Unlike the defendant in *Ford*, Banks had sixty days after the rule change (in the form of the amendment of the PCRA) to assert his claims. We therefore found the state grounds were adequate as a procedural bar. *Id.* at *4-*5 and *5 n. 2.

[4] The subsection reads in full:

(b) Time for filing petition –

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> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petition proves that:
>
> (i) the failure to raise the claim previously was the result of interference with the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.
>
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.
>
> (3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States or the Supreme Court of Pennsylvania, or at the expiration of time for seeking such review.
>
> (4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether

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since (1) not every subsection of the statute is jurisdictional in nature, and (2) the limitations subsection does not invoke clear language of jurisdiction, it cannot be said that § 9545(b) is necessarily jurisdictional in nature, as opposed to a statute of limitations subject to equitable tolling. *Cf. Miller* at 618 (AEDPA time limit statute of limitations subject to equitable tolling because term "jurisdiction" not used); *Calderon v. U.S. Dist. Court for C.D. of Calif.*, 128 F.3d 1283, 1288 (9th Cir. 1997) (Kozinski, J.; opinion on which Third Circuit relied in *Miller*; also finding that failure to use language of jurisdiction indicates statute of limitations subject to equitable tolling), *reh'g, reh'g en banc denied, cert. denied*, 522 U.S. 1099, 118 S.Ct. 899, 139 L.Ed.2d 884 (1998).[5] That it is entirely reasonable to conclude that § 9545(b) is a statute of limitations rather than a jurisdictional provision is reflected in *Lambert v. Blackwell*, 134 F.3d 506, 523-524 (3d Cir. 1997), in which the provision was so denominated.

The second point is that, prior to considering second petitions in the context of the amended version of the PCRA, the Supreme Court had applied a "relaxed waiver" standard for preserving issues for review in capital cases. *Banks VI* at 376 (citing *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937 (1982); *Commonwealth v. Beasley*, 544 Pa. 554, 678 A.2d 773 (1996), *cert. denied*, 520 U.S. 1121, 117 S.Ct.

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> appointed or retained.
>
> 42 Pa.Cons.Stat.Ann. § 9545(b).

[5] The Ninth Circuit has overruled its prior opinion in *Calderon* but not for the reasons for which the Third Circuit cited the opinion. *Calderon v. U.S. Dist. Court for C.D. of Calif.*, 163 F.3d 530 (9th Cir. 1998) (en banc).

1257, 137 L.Ed.2d 337 (1997)). Because it found the amended version of § 9545(b) to be jurisdictional in nature, however, it declined to apply (actually, without jurisdiction, it could not apply) the relaxed waiver standard in Banks' case. *Id.*[6]

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[6] The Supreme Court of Pennsylvania cited *Commonwealth v. Peterkin*, 554 Pa. 547, 722 A.2d 638 (1998), *reargument denied*, for the proposition that, as a matter of jurisdiction, a PCRA petition must be filed within one year of final judgment. *Banks VI* at 376. While there is language in Peterkin to that effect, the holding is not altogether clear. The first reference to such a holding is the Supreme Court's recitation of the Commonwealth's position that the PCRA court lacked jurisdiction because the petition was untimely. *Id.* at 639. The next reference is the Supreme Court's quotation of § 9545(b)(1), including the caption of the section. *Id.* at 640. Finally, the Supreme Court stated, "As noted, on November 17, 1995, the General Assembly amended the PCRA to require that, as a matter of jurisdiction, a PCRA petition must be filed within one year of final judgment: . . ."; it then quoted § 9545 (b)(1), (3), again with the caption. *Id.* at 641. Otherwise, the opinion is written in terms of the statutory exceptions to the one-year limitation period and the need for finality. No explanation is provided as to why the limitation is jurisdictional as opposed to a statute of limitations (or, to use the language of the caption, why "jurisdiction" applies and "proceedings" does not). Also, the future non-applicability of any form of the relaxed waiver rule is not discussed.

We conclude from all of this that *Peterkin*, unlike *Banks VI*, is not sufficiently clear to establish the jurisdictional nature of the one-year limitation rule to end the equitable tolling of Banks' limitations period. Even if it did, of course, since *Peterkin* was issued December 21, 1998, with reargument denied February 17, 1999, the period between December 21, 1998 (assuming the

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Based on the foregoing, we do not think that, prior to the holding of the Supreme Court in *Banks VI*, Banks can be said to have had notice that § 9545(b) would be considered jurisdictional in nature. Only at the time of that ruling can it be said with certainty that Banks would be absolutely barred from presenting his unexhausted claims to the state courts on the basis of jurisdiction which, from respondents' point of view, also would mean that Banks had forfeited, without notice, his exhausted claims. We conclude that this would not be an adequate state ground or, at least, would be a reason for equitable tolling of § 2244(d)'s limitations period. We emphasize that the tolling of the limitations period is equitable, not the statutory tolling for which § 2244(d)(2) provides.

Of course, this must be contrasted with our earlier holding concerning the unexhausted claims (*Banks VII*). In that instance, Banks had sixty days' notice that the limitations period of § 9545(b) would become effective and might well bar his second PCRA petition, regardless of whether the basis was found to be jurisdictional or simply expiration of the limitations period and no basis for tolling. The prior notice is what supports the state law ground, i.e. makes it adequate, and bars presentation of the unexhausted claims in this court.

In our holding, we reach the same conclusion as was reached in *Fidtler v. Gillis*, 1999 WL 450337 (E.D.Pa. June

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earlier date applies), and March 22, 1999, still would not have exceeded the one year allowed before bringing the petition in this court.

29, 1999), though by a different analysis.[7] In that case, the court found that the petitioner's claims in a petition under § 2254 had not been exhausted but might be barred by § 9545 (b)(1).[8] Relying on cases decided prior to *Banks VI*, *see Fidtler* at *5-*6 (citing *Lambert*; *Commonwealth v. Alcorn*, 703 A.2d 1054, 1057 (Pa.Super. 1997), *allocatur denied*, 555 Pa. 711, 724 A.2d 348 (1998) (table); *Commonwealth v. Ferguson*, 722 A.2d 177, 179 (Pa.Super. 1998); *Commonwealth v. Austin*, 721 A.2d 375, 377 (Pa.Super. 1998), *allocatur denied*, 1999 WL 266268 (Pa. May 04, 1999) (table); *Banks V*), the court dismissed the case so that the operation of § 9545(b) could be determined by the state courts in the first instance. However, because the petitioner's exhausted claims might be barred (as through taking more than a year to exhaust), the court dismissed without prejudice. In this way, the filing date of an amended petition would relate back to the date of the filing of the original petition under Fed.R. Civ.P. 15(c)(2), and the one-year bar could be avoided. *Id.* at 211-12.[9]

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[7] The difference in the analysis stems from the fact that this court previously dismissed a § 2254 petition pursuant to an order of the Court of Appeals and now is considering the second petition, while the court in *Fidtler* was considering the petition at the time of dismissal. Also, unlike the court in *Fidtler*, we are presented with an instance in which a second PCRA petition clearly is barred because the state courts already have so held. The court in *Fidtler* does not mention the applicability of *Banks VI* (that § 9545(b) is jurisdictional) to the facts before it.

[8] Which the court denominated a "statute of limitations."

[9] The Third Circuit discussed a similar problem in *Morris v. Horn*, No. 98-9008 (3d Cir. Aug. 9, 1999), a slip opinion which was received in this court after the drafting of this opinion.

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In other words, the court found that it would be unfair to require exhaustion only to have the time necessary for exhaustion lead to a bar of the petitioner's claims. This is especially so when there is a possibility that one or more of the exceptions to the jurisdictional time bar may apply. The *Fidtler* court therefore used the vehicle of dismissal without prejudice to avoid the statutory bar and resulting unfairness. In this case, we have determined that the limitations period was equitably tolled during the time that Banks' second PCRA petition was pending. Thus, the unfairness of not permitting a petitioner to present exhausted claims based on a time limitation which expires during a required attempt to exhaust other claims is avoided.

In short, we find that the statute of limitations under § 2244(d) was tolled during the period between October 24, 1997, and March 2, 1999. However, we limit our holding to the facts of this case, since the Supreme Court of Pennsylvania now has provided notice that § 9545(b) is to be read as a jurisdictional limit and not subject to relaxed waiver. Thus, the filing of an untimely PCRA petition would not toll the limitations period under § 2244(d) in every case.

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Morris was granted an order similar to that in *Fidtler*. The Third Circuit indicated that, if the second PCRA petition was found to be untimely and the "relation back" strategy was found to be invalid, the entire time that the second PCRA petition was pending was not tolled under § 2244(d)(2). *Id.* at 7. The Third Circuit indicated, however, that it was not deciding the question of equitable tolling, *id.* at 14 n. 5, the basis for our ruling in this case.

IV. STANDARD

The amended version of § 2254, which sets forth a more stringent standard for issuance of the writ, although not applicable to Banks' earlier petition, is now applicable because the instant petition was filed after the effective date of AEDPA. We note initially that we reject Banks' contention that pre-AEDPA standards govern because he filed an earlier petition that was dismissed as a mixed petition. Banks cites *Christy v. Horn*, 115 F.3d 201, 208 (3d Cir. 1997), for the proposition that a petition which is filed after a prior petition was dismissed for failure to exhaust is not a second or successive petition. This very principle contradicts Banks' next argument, that his petition is a "continuation" of the proceedings related to his prior petition in this court. Actually, the point of *Christy* is that, once a petitioner has exhausted all of his state remedies and files a petition under § 2254, that petition is a "first" petition for purposes of the district court's authority to entertain the petition without prior approval of the court of appeals. *See* 28 U.S.C. § 2244(b)(3).

The same is true of *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998), on which Banks also relies. In that case, the Supreme Court equated a claim dismissed as unripe with a claim dismissed as unexhausted for purposes of whether a petition asserting the claim was a second or successive petition for purposes of § 2244. Thus, when the petitioner's claim that he was incompetent to be executed (dismissed initially by the district court as unripe) was presented later, the petition was to be considered a "first" petition and no authorization from a court of appeals was necessary.

Banks points to language in *Stewart* which says, "A court where such a petition was filed could adjudicate these claims under the same standard as would govern any other first petition." 118 S.Ct. at 1622. Actually, any other first petition would be governed by the standards enacted in AEDPA.

Nothing in *Stewart*, *Christy*, or AEDPA indicates that pre-AEDPA law applies in cases in which the petitioner has had a prior petition dismissed for failure to exhaust. On March 22, 1999, when Banks filed the instant petition, which must be deemed his "first" petition under 28 U.S.C. § 2244(b)(3), AEDPA was in effect and AEDPA principles apply.

The relevant provisions now read:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

> (e)(1) In a proceeding initiated by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(d), (e)(1). Also, the circumstances which would warrant an evidentiary hearing in the habeas court are strictly limited under 28 U.S.C. § 2254(e)(2).

Since AEDPA was passed, the state court decision is the starting point in habeas review. *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 885 (3d Cir. 1999). Section 2254(d) sets forth two conditions (subsections (d)(1) and (d)(2)), at least one of which must be met before habeas relief may be granted. *Id.* at 887. Examination of the first of these conditions entails a two-step analysis.

Before granting relief under § 2254(d)(1) for a state court adjudication of a claim "contrary to" established federal law as established by the Supreme Court, the habeas court first must "identify the applicable Supreme Court precedent and determine whether it resolves the petitioner's claim." *Id.* at 888. "[T]his analysis requires 'something more than a recognition that the Supreme Court has articulated a general standard that covers the claim.'" *Id.* (quoting *O'Brien v. Dubois*, 145 F.3d 16, 24 (1st Cir. 1998)). Rather, the petitioner must show that "'Supreme Court precedent requires an outcome contrary to that reached by the relevant state court.'" *Id.* (quoting *O'Brien* at 24-25). The Supreme Court precedent need not be factually identical to the petitioner's case, but must be a rule which, by virtue of factual similarity or distillation of general precepts into a channeled mode of

analysis intended for application to variant factual situations, can fairly be said to require a particular result in the petitioner's case. *Id.* at 888-889.

If the state court decision was not "contrary to" applicable Supreme Court precedent, then the federal habeas court must determine whether the state court decision was based on an "unreasonable application of" established Supreme Court precedent. *Id.* at 889. An "unreasonable application" is not one with which the habeas court disagrees or one which leads to a different result than the habeas court would reach on its own. *Id.* Rather, the "question is whether the state court's application of Supreme Court precedent was objectively unreasonable." *Id.* at 889-890. Under this standard, habeas relief is not warranted "unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." *Id.* at 890. While it is Supreme Court precedent that supplies the applicable rule, thereby precluding consideration of the opinions of lower federal courts on questions not addressed by the Supreme Court, a habeas court may consider lower federal court decisions in determining the reasonableness of the state court's application of Supreme Court precedent, that is, as helpful amplifications of Supreme Court precedent. *Id.*

Prior to the passage of AEDPA, there was a presumption in habeas corpus proceedings that factual determinations by a state court were correct. *Jackson v. Byrd*, 105 F.3d 145, 147 (3d Cir.), *reh'g denied, cert. denied*, 520 U.S. 1268, 117 S.Ct. 2442, 138 L.Ed.2d 201 (1997).[10]

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[10] The Third Circuit has yet to address the standard for federal habeas review of factual findings by the state courts. Each of

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Since AEDPA was enacted, the presumption of correctness still applies but the quantum of proof necessary to rebut the presumption has been increased (to the "clear and convincing" standard), making it more difficult for the petitioner to do so. *Warren v. Smith*, 161 F.3d 358, 360-361 (6th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 2403, 144 L.Ed.2d 802 (1999); *Bressette v. N.Y. State Div. of Parole*, 2 F.Supp.2d 383, 386-387 (W.D.N.Y.1998). Thus, federal courts on habeas review are required to give greater deference to factual determinations by state courts. *Bressette* at 387 (quoting, *inter alia*, *Ford v. Ahitow*, 104 F.3d 926, 936 (7th Cir. 1997); *Houchin v. Zavaras*, 107 F.3d 1465, 1470 (10th Cir. 1997)). The presumption applies to findings of fact by both the trial and appellate courts of the state. *Id.* at 386.

V. MENTAL COMPETENCY

Although not numbered first among the issues presented by Banks, we address first the question of Banks' mental competency at the time of trial because several of the claims flow from the competency issue.

Even before enactment of AEDPA, the Supreme Court of the United States held that a state court's finding of competency was a factual matter which is binding on a

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its recent opinions under § 2254 involved petitions filed before the effective date of AEDPA, so that pre-amendment standards applied. *See Byrd* at 147; *Buehl v. Vaughn*, 166 F.3d 163, 168-169 (3d Cir.), *cert. dismissed*, ___ U.S. ___, 119 S.Ct. 2418, 144 L.Ed.2d 815 (1999); *Meyers v. Gillis*, 142 F.3d 664, 667 (3d Cir. 1998). Hereafter, then, we look to the language of the statute and opinions of other courts interpreting that language.

federal court unless the record does not support the finding. *Demosthenes v. Baal*, 495 U.S. 731, 735, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990) (per curiam). However, the duty to determine a defendant's mental competency continues throughout trial, and a trial court must stop the trial and conduct a hearing when there are circumstances suggesting a change in the defendant's psyche rendering the defendant incompetent to stand trial. *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). Still, there is no constitutional requirement of a second or successive hearing absent evidence of a substantial change in the mental condition. *Senna v. Patrissi*, 5 F.3d 18, 20 (2d Cir. 1993).

A criminal defendant is competent to stand trial if he or she has the ability to consult with counsel to a reasonable degree of rational certainty and has a rational and factual understanding of the proceedings. *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam); *McFadden v. United States*, 814 F.2d 144, 146 (3d Cir. 1987).[11]

The trial court conducted a pre-trial hearing to determine whether Banks was competent to stand trial. The court's finding of competence was supported by the testimony of a psychiatrist called by the Commonwealth and therefore is supported by the record. Banks argues, however, that his mental condition deteriorated during trial until he became incompetent; that is, he decompensated during trial. We discussed this issue at length in *Banks IV*, and we believe that discussion continues to be applicable:

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[11] This test is codified at 18 U.S.C. § 4243(a). The analogous provision under Pennsylvania law is codified at 50 Pa.Stat. Ann. § 7402(a).

As noted, the trial court made a pre-trial determination that Banks was mentally competent to stand trial. The court continued to observe Banks for signs that his condition with respect to competency had changed. *See, e.g.*, N.T. trial vol. 2 at 454-455 (June 8, 1983) (noting that questioning by and demeanor of Banks established competency); vol. 5 at 1,645 (June 16, 1983) (noting that trial court had seen nothing to warrant change of mind with respect to competency determination); *Banks I* at 13 (reciting factual finding of trial court as to Banks' demeanor and participation as related to competency, also set forth in present record in Respondents' Appendix A (record document no. 33, Opinion dated October 17, 1985, at 15 n. 2)). Banks asked meaningful, at times very insightful, questions of witnesses. *See, e.g.*, N.T. trial vol. 2 at 888-889 (June 9, 1983) (eliciting testimony of firearms/ballistics expert that it was unlikely that ammunition from weapon used would be found in body because of its velocity, despite fact that fragments were found in the body). It also should be noted, as pointed out by Banks, that defense counsel repeatedly reminded the trial court of its duty to consider Banks' competency through a number of motions to suspend proceedings for another competency hearing.

Based on the foregoing, it is clear that the trial court remained mindful of its responsibility with respect to the determination of competency, and determined that Banks was mentally competent to stand trial.

The only evidence of a change in the mental condition of Banks during the course of the trial to

which he points is the testimony of Park E. Dietz, M.D., a psychiatrist called by the Commonwealth on the issue of Banks' sanity at the time of the offenses. N.T. trial vol. 5 at 1,800-1,888; 1,890-1,932 (June 17, 1983). Specifically, Dr. Dietz testified on direct examination, in part, as follows:

> . . . I had the opportunity to observe Mr. Banks testify yesterday, and his testimony shows that he has paranoia, to me.
>
> I recognized, in his testimony, every one of the symptoms of his disease that has been discussed in the testimony I've heard. Yesterday Mr. Banks showed delusions and psychotic thought, which is really the symptom of this illness. And so, yesterday, I was able to observe that.
>
> He's been said to be on a deteriorating course, getting worse with this illness. Dr. Spodak testified, in a hearing that I attended last February 28, that Mr. Banks was deteriorating rapidly. And there's been testimony since then that Mr. Banks is deteriorating. Given that and given the fact that he's been psychotic since he was in prison, I think yesterday I had a chance to see him at his worst and to see all the symptoms that Mr. Banks shows when he is at his sickest.

Id. at 1,828. Dr. Dietz added later in his testimony on direct examination:

> Now, Mr. Banks was described by Dr. Turchetti as being more floridly psychotic in February than he had been back in October, at the original interviews, and I think that significant, because I've indicated to you that Mr. Banks seems to be worse now than he was in the past; that his behavior on the witness stand is, by all accounts, more seriously disordered than his behavior before the shootings and, in my opinion, at the time of the shootings, so the disorder, according to Dr. Turchetti, was worse in February than in October.

Id. at 1,835.

This testimony is consistent with all of the psychiatric testimony on the issue of whether Banks suffered from a mental disease or defect. That is, all of the psychiatrists agreed that Banks suffered from paranoia or paranoid psychosis, which is distinguishable from paranoid personality and paranoid schizophrenia. In the current version of the standard text on mental disorders, the disease described by the psychiatrists appears to be a "delusional disorder," subclassified as a "persecutory type." *Diagnostic and Statistical Manual of Mental Disorders* 296-298 (4th ed.1994). Dr. Weatherly cited an earlier version in his testimony. N.T. competency hearing at 10 (May 6, 1983) (citing *Diagnostic and Statistical Manual Three*, or third edition, and diagnosing as "numerically number 297.10").

The differences in the testimony appear in the opinions of the psychiatrists with respect to the impact of the disease on Banks' cognitive abilities.

During trial, the psychiatrists called by the defense opined that, as a result of the paranoia, Banks was unable to understand the nature and consequences of his actions or to distinguish right from wrong at the time of the offenses, while the Commonwealth's psychiatrists reached the opposite conclusion (despite accepting the existence of the disease). In other words, the testimony was in conflict as to the effect of the disease on Banks' cognitive functions. *See esp.* N.T. trial vol. 5 at 1,828 (June 17, 1983) (testimony of Dr. Dietz that "... as for the effect on thinking, on judgment, on other areas of mental life, paranoia doesn't have an effect on those areas of mental life"). Moreover, Dr. Sadoff testified during the pre-trial competency hearing that Banks' paranoia did not render him incompetent to stand trial. N.T. competency hearing at 198 (March 15, 1983). There are, then, two problems with Banks' argument that the testimony of Dr. Dietz required the trial court to suspend the trial and conduct a full-blown competency hearing. First, Dr. Dietz was not testifying that Banks actually was deteriorating or decompensating; he was assuming as much based on previous testimony. Second, there is not necessarily a link between the disorder and mental competency to stand trial; in fact, the trial court had rejected such a link, supported by Dr. Sadoff's testimony, when it found Banks competent after the original hearing. Considering this evidence and accepting as true Banks' contention that his paranoia grew worse as trial approached and during trial, it does not follow that Banks was not competent.

We conclude that: (1) the trial court fulfilled its ongoing, constitutional obligation to ensure that Banks was competent to stand trial; (2) the trial

court's determination that Banks was competent is supported by the record; and (3) the equivocal nature of the evidence on which Banks relies, weighed against the evidence of the ongoing observation of Banks by the trial court, makes the testimony of Dr. Dietz insufficient to rebut the presumption that the determination of competency was correct. In the language of *Drope*, there are no "circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." Based on this conclusion, we find that grounds (2) and (4) of Banks' petition do not warrant habeas relief.

Banks IV at 1171-1173. We reach the same conclusions at this time. In the terms now applicable under § 2254(d), the decision of the state courts in finding that Banks was competent did not result in a decision (1) contrary to or involving an unreasonable application of clearly established federal law or (2) based on an unreasonable factual determination in light of the evidence produced in the state court proceedings. The finding of competence leads to the denial of habeas relief for the claims numbered (2), (4), and (5).

VI. WAIVER OF RIGHT TO COUNSEL

The first claim asserted by Banks (numerically) is that he did not effect a knowing and voluntary waiver of the right to counsel under the Sixth Amendment. Actually, Banks never waived the right to counsel and continued to be represented throughout the course of the trial. However, he did participate to some extent in the conduct of his defense. Banks' participation included personally cross-examining the ballistics expert called by the Commonwealth, testifying in his own defense, and directing counsel as to questions on

cross-examination of the coroner and deputy coroners during presentation of the Commonwealth's rebuttal evidence. During his own testimony, Banks introduced photographs into evidence which had been excluded by the trial court during the Commonwealth's case in chief.

Banks contends that, in allowing him to participate to such an extent in his defense, the trial court in effect allowed him to proceed *pro se* without conducting a colloquy as to whether the waiver of the right to counsel was knowing and voluntary. *See generally Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). Actually, Banks' participation in his defense constituted hybrid representation, which is a matter within the discretion of the trial court. *United States v. Einfeldt*, 138 F.3d 373, 378 (8th Cir.), *cert. denied*, 525 U.S. 851, 119 S.Ct. 126, 142 L.Ed.2d 102 (1998); *United States v. Treff*, 924 F.2d 975, 979 n. 6 (10th Cir.), *cert. denied*, 500 U.S. 958, 111 S.Ct. 2272, 114 L.Ed.2d 723 (1991).[12]

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[12] We do not attempt here to establish a bright line between proceeding *pro se* and hybrid representation. At least one commentator has discussed such a bright line, concluding that a *pro se* defendant conducts the entirety of the defense. If there is standby or advisory counsel (the terms apparently meant to be interchangeable), counsel is present in the courtroom but silent as to the presentation of the defense. Standby or advisory counsel's role is limited to providing technical advice, protecting the record for appeal, and being available to take over the case if the defendant waives the right to proceed *pro se*. Whenever counsel takes any active role in the defense, it is termed a hybrid defense. Note, *The Accused as Co-Counsel: The Case for the Hybrid Defense*, 12 Valparaiso L.Rev. 331, 331-332 (1978).

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In *United States v. Leggett*, 81 F.3d 220, 223-226 (D.C.Cir.1996), the defendant supplemented his counsel's questions with questions of his own, cross-examined three government witnesses, asked questions of two witnesses called by the defense, and made a closing argument after his own counsel's argument. Because Leggett did not forgo the right to counsel, instead supplementing representation by counsel, the District of Columbia Circuit held that he had not elected to proceed *pro se* and no colloquy was required. "Leggett wanted both the benefit of counsel and the ability to take the reins himself from time to time . . . and by dint of the court's indulgence, he had his cake and ate it too." *Id.* at 226 (citation omitted).

Banks argues, however, that a waiver of the right to counsel is required even in the instance of hybrid representation. In support of this proposition, he cites three cases from the Ninth Circuit, *United States v. Turnbull*, 888 F.2d 636, 638 (9th Cir. 1989), *cert. denied*, 498 U.S. 825, 111 S.Ct. 78, 112 L.Ed.2d 51 (1990), *United States v. Kimmel*, 672

(Continued)

On the other hand, the Third Circuit in *Bontempo v. Fenton*, discussed in the text *infra*, held that a defendant was not required to waive the right to counsel because his own part in presenting the defense was merely supplemental to his counsel's representation. This holding can be taken to mean that the representation becomes effectively *pro se* at some point before the defendant takes over sole control of the defense; that is, at the point at which the defendant's role is no longer merely supplemental to counsel's role.

In this case, Banks supplemented rather than supplanted his counsel, and so the dilemma need not be resolved.

F.2d 720 (9th Cir. 1982), and *Evans v. Raines*, 534 F.Supp. 791, 797 n. 9 (D.Ariz.1982); a Tenth Circuit case which does not stand for the proposition for which it is cited, *United States v. Padilla*, 819 F.2d 952, 959-960 (10th Cir. 1987); a Pennsylvania Superior Court case, *Commonwealth v. Palmer*, 315 Pa.Super. 601, 462 A.2d 755, 758 (1983); and the dissent in a Third Circuit opinion, *Bontempo v. Fenton*, 692 F.2d 954, 963 (3d Cir. 1982) (Sloviter, J., dissenting), *reh'g, reh'g in banc denied, cert. denied*, 460 U.S. 1055, 103 S.Ct. 1506, 75 L.Ed.2d 935 (1983).

We begin with the Tenth Circuit opinion, *Padilla*. In that case, the defendant elected to proceed *pro se*. The Tenth Circuit stated that the appointment of standby counsel is preferred in such circumstances but the court still must ensure that the waiver of the right to counsel is knowing and intelligent. 819 F.2d at 959-960. Banks recites the holding in this respect as "valid waiver of counsel required when there is anything less than full representation by counsel." Brief in Support of Petition for Writ of Habeas Corpus at 8. Actually, the opinion states, "Anything less than full representation by counsel raises the question of valid waiver of the right to counsel." *Padilla* at 960 (citations omitted).

Thus, while it is true that *Padilla* stands for the proposition that the court must examine whether the arrangement is one of hybrid representation or *pro se* status with standby counsel (the latter requiring a waiver of the right to counsel), and suggests that anything less than full representation gives rise to this duty to examine, it does not equate hybrid representation with *pro se* status. In fact, the Tenth Circuit in *Treff* (at 979 n. 6) noted that a request to proceed with hybrid representation is not deemed a request to proceed *pro se*, thereby specifically distinguishing the two situations. Also, in *Treff*, the defendant argued that his right to

represent himself was violated when his request to participate in his defense was denied. The Tenth Circuit held that he did not make an unequivocal request to proceed *pro se*, and so the argument failed. It should be noted however, that the defendant was permitted to begin an opening statement.[13] That action was not found to be the equivalent of proceeding *pro se*.

We conclude that the Tenth Circuit does *not* require a waiver of the right to counsel under *Faretta* before the trial court may exercise its discretion to permit hybrid representation.

Banks' citation to *Palmer* also misses the mark. In that case, the defendant elected to proceed *pro se* with the exception of selecting a jury, making closing remarks, and filing post-trial motions. Those actions would be left to standby counsel, who also would confer with the defendant during trial. *Palmer* at 758. The defendant would personally make an opening statement and examine witnesses. *Id.* at 758-759. The Superior Court held that this arrangement really did not constitute *pro se* representation but a partial waiver of the right to counsel. *Id.* at 759. Thus, a colloquy on the partial waiver was necessary, but only as to those aspects of the trial for which the defendant would be representing himself. *Id.*

Several points must be emphasized about *Palmer*. First, the Superior Court referred to Pa.R.Crim.P. 318(c), not the Constitution, as the basis for its ruling. Second, the trial court did instruct the defendant on those aspects of the trial for which he represented himself, which is the same as

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[13] Treff's opening statement was cut short when he accused the trial judge of bias. *Treff* at 979.

occurred in this case: the trial court warned Banks about the wisdom of those actions taken *pro se*. Finally, the Superior Court concluded in *Palmer* that the defendant was proceeding effectively *pro se*. We have not so concluded, and therefore the principle announced in *Palmer* is inapplicable.[14]

More on point is *State v. Layton*, 189 W.Va. 470, 477-479, 432 S.E.2d 740, 747-749 (1993) (citing, *inter alia*, *Bontempo*, discussed below, and *Palmer*), in which the rationale for distinguishing between *pro se* representation and hybrid representation is discussed thoroughly. Succinctly stated, when counsel participates in the defense of the case by assisting the defendant and actually presenting the defense, there is not the danger faced by a defendant who opts to represent himself or herself, or with merely a technical advisor. *Id.* at 478, 432 S.E.2d 740, 432 S.E.2d at 748 (quoting *State v. Barker*, 35 Wash.App. 388, 395, 667 P.2d 108, 113 (1983)).

We do not believe that it is necessary to determine the exact contours of what will constitute hybrid representation versus standby counsel or advisory counsel. Whatever the precise extent to which counsel must participate in the defense before counsel will be part of hybrid representation, as

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[14] In *Commonwealth v. Lloyd*, 370 Pa.Super. 65, 535 A.2d 1152, *allocatur denied*, 518 Pa. 637, 542 A.2d 1367 (1988) (table), the Superior Court relied on *Palmer* in holding that the standard of completeness of the colloquy under Rule 318(c) is lower when standby counsel is appointed. The Supreme Court of Pennsylvania abrogated *Lloyd* in *Commonwealth v. Brazil*, 549 Pa. 321, 326, 701 A.2d 216, 219 (1997), when it held that a full and complete colloquy is necessary whenever a defendant seeks to waive the right to counsel. This holding undermines, and probably abrogates, the holding of *Palmer* to the effect that a partial waiver only requires a partial colloquy.

opposed to standby or advisory counsel, we think that there plainly was hybrid representation of Banks.

We turn next to the only Third Circuit opinion cited by Banks, *Bontempo*, an appeal from the granting of a writ of habeas corpus. In that case, the state trial court was giving the final charge to the jury when the defendant interrupted by shouting, "I would like to say something." The outburst continued before the jury was removed from the courtroom. The judge indicated that the defendant would be permitted to address the jury (in effect a closing argument) and even to reopen the defense for further testimony, and allowed the defendant to consult with counsel. After consulting with his attorney and a short colloquy with the court, the defendant addressed the jury. 692 F.2d at 956. One of the defendant's arguments was that the additional summation deprived him of the assistance of counsel in violation of the Sixth Amendment. *Id.* at 959-961.

In a 2-to-1 decision, the Third Circuit found no violation of the Sixth Amendment for several reasons, such as the fact that his statement permitted him to place before the jury a number of matters which would not have been admissible had he testified under oath. The tactic also permitted the defendant to avoid cross examination on his prior criminal record. *Id.* at 960. Most important for present purposes is the following portion of a footnote in the majority opinion:

> As the dissent aptly notes, the unorthodox procedure used at the trial causes some difficulty in categorizing the alleged violations in this case. Although the dissent finds a partial deprivation of counsel in Bontempo's summation, *his remarks were really supplemental to, and not in lieu of*, retained counsel's closing to the jury. In the circumstances here, it is not clear that Bontempo's actions amounted to a "partial waiver of his right to counsel." . . .

Id. at 961 n. 6 (emphasis added).

In dissent, Judge Sloviter viewed the defendant's statement to the jury as a partial waiver of the right to counsel requiring the same inquiry as a complete waiver. *Id.* at 964. Rather obviously, a dissenting opinion would not be a valid basis on which this court may rely; we are bound by the majority opinion. Since the Third Circuit has held that a represented defendant may "supplement" his defense, the situation in this case, Banks' argument fails.

With respect to the opinions of the Ninth Circuit cited by Banks, we disagree with the reasoning and adopt instead the rationale stated in *Layton*. This would be so even if we were not bound by *Bontempo*.

Also, after this review of the law of hybrid representation, we note that Banks points to no opinion of the Supreme Court of the United States which would clearly establish that a criminal defendant is entitled to an inquiry by the trial court before it exercises its discretion to permit hybrid representation. Rather, *Faretta* and *McKaskle* were addressed to the right to proceed *pro se* and to the more traditional situation of a defendant appearing *pro se* with the court appointing standby counsel for the purpose of answering procedural questions. The absence of Supreme Court authority existed at the time of Banks' trial and continues today, so that retroactivity analysis is not implicated. Banks is not entitled to habeas relief in absence of such authority, and the claim numbered (1) must be denied on this basis.

VII. WAIVER OF RIGHT AGAINST SELF-INCRIMINATION

In his claim numbered (3), Banks alleges that he did not effect a knowing, intelligent and voluntary waiver of his right against self-incrimination under the Fifth Amendment. The primary basis for this claim is that Banks was not competent to waive his rights. The issue of competency has been addressed and resolved against Banks, and so this argument fails.[15] Banks is not entitled to habeas relief on the claim numbered (3).

VIII. JURY INSTRUCTIONS, VERDICT SLIP, JURY POLL

Banks' sixth claim is that the trial court's instructions to the jury, the verdict slip, and the jury poll in the sentencing phase all required the jury to find unanimously both aggravating and mitigating circumstances, in violation of the defendant's Eighth Amendment rights. Such a requirement would violate the rule of *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). *See also McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). As we noted in *Banks IV*, there is no substantial difference between the charge and verdict form used by the trial court in this case and the charge and verdict form reviewed by the Third Circuit in *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 306-309 (3d Cir.), *reh'g denied, cert. denied*, 502 U.S. 902, 112 S.Ct. 280, 116 L.Ed.2d 232 (1991).

> [The jury charge and verdict form] state repeatedly that the jury must find unanimously at least one

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[15] Regardless, it should be noted that the trial court in fact did warn Banks concerning his decision to testify.

> aggravating circumstance beyond a reasonable doubt and that any aggravating circumstances so found must out weigh any mitigating circumstances (to be found by a preponderance of the evidence). They also state that the final verdict must be unanimous. Nowhere is there a statement that any mitigating circumstances must be found unanimously by the jury before they could be weighed against any aggravating circumstances.

Banks IV at 1174. *See also DeShields v. Snyder*, 829 F.Supp. 676, 688 (D.Del.1993) (reaching same conclusion reviewing similar jury instruction). In fact, other federal courts have been consistent in holding that there is no constitutional violation in jury instructions which state that the jury must be unanimous in finding aggravating circumstances and do not state that the jury must be unanimous as to any mitigating circumstances, but also do not specify that the jury need not be unanimous as to any mitigating circumstances. *See Noland v. French*, 134 F.3d 208, 213 (4th Cir.) (citing *Smith v. Dixon*, 14 F.3d 956, 981 n. 15 (4th Cir.) (en banc), *cert. denied*, 513 U.S. 841, 115 S.Ct. 129, 130 L.Ed.2d 72 (1994); *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir.1993), *cert. denied*, 510 U.S. 1171, 114 S.Ct. 1208, 127 L.Ed.2d 556 (1994); *Maynard v. Dixon*, 943 F.2d 407, 418-420 (4th Cir.1991), *cert. denied*, 502 U.S. 1110, 112 S.Ct. 1211, 117 L.Ed.2d 450 (1992)), *cert. denied*, 119 S.Ct. 125, 142 L.Ed.2d 101 (1998); *Duvall v. Reynolds*, 139 F.3d 768, 791-792 (10th Cir.), *cert. denied*, 525 U.S. 933, 119 S.Ct. 345, 142 L.Ed.2d 284 (1998); *Griffin v. Delo*, 33 F.3d 895, 905-906 (8th Cir.1994), *reh'g, reh'g en banc denied, cert. denied*, 514 U.S. 1119, 115 S.Ct. 1981, 131 L.Ed.2d 869 (1995); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120-1121

(6th Cir.1990) (en banc; dissenting opinion),[16] *cert. denied*, 499 U.S. 970, 111 S.Ct. 1608, 113 L.Ed.2d 669 (1991).

In contrast, the Third Circuit has reviewed a jury charge similar to that used by the trial court in this case, and to many of those discussed in the cases cited above, and concluded that "it was reasonably likely that the jury could have believed that it was required to find the existence of mitigating circumstances unanimously before those circumstances could be considered in its deliberations." *Frey v. Fulcomer*, 132 F.3d 916, 924 (3d Cir. 1997), *cert. denied*, 524 U.S. 911, 118 S.Ct. 2076, 141 L.Ed.2d 151 (1998).[17] Banks relies on *Frey* due to the similarity of language in the jury charges.

There are several problems with reliance on *Frey*. First, it does not appear from the language of § 2254 that the principles enunciated in *Frey* are applicable to the case before us. *Frey* involved a habeas petition filed prior to AEDPA, so that the amended version of § 2254 did not apply. That section now permits the granting of relief only if the state courts' resolution of the federal issue "resulted in a decision that was contrary to, or *involved* an unreasonable application of," Supreme Court precedent. Sec. 2254(d)(1) (emphasis added). The use of the past tense indicates that it

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[16] Although part of the dissenting opinion, nine judges including the author joined the portion cited (designated Part IV of the dissent). Since thirteen judges were sitting en banc, Part IV commanded a majority.

[17] This issue is likely to recur, since the Supreme Court of Pennsylvania adamantly rejected the Third Circuit's opinion in *Frey*. *Commonwealth v. Cross*, 555 Pa. 603, ___, 726 A.2d 333, 336-338 (1999).

is the time of the state court decision that is relevant, not the time of habeas review. *See also* § 2254(e)(2)(A)(i) (condition for evidentiary hearing is that new rule of constitutional law has been made retroactive to cases on collateral review by Supreme Court, thereby precluding retroactivity analysis by habeas court). *Mills* was not decided until 1988, some five years after Banks' conviction and sentence, and has not been made retroactive by the Supreme Court. Because we find that the language of AEDPA establishes that the point in time at which the Supreme Court precedent must be "clearly established" is at the time that the state court makes its ruling on the federal constitutional issue, we do not address the parties' arguments concerning the retroactivity of *Mills*.

Moreover, as reflected in the decisions cited above, Supreme Court precedent (in the form of *Mills* and *McKoy*) did not require an outcome contrary to that reached by the state courts. That the Third Circuit reached a contrary result does not mean that the decision of the state courts was unreasonable.

Banks is not entitled to habeas relief on his claim numbered (6).

IX. PROPORTIONALITY REVIEW

Finally, Banks contends that the Pennsylvania statute governing proportionality review which was in effect at the time of his initial appeal to the Supreme Court of Pennsylvania violated his right to procedural due process.[18] This claim lacks merit for a number of reasons.

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[18] The provision requiring proportionality review by the Supreme Court of Pennsylvania, 42 Pa.Cons.Stat.Ann. § 9711(h),

(Continued)

First, proportionality is not constitutionally mandated. *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). In *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), the petitioner challenged some of the wording of an aggravating factor under the Arizona death penalty statute which had been limited by the state supreme court's construction. The Supreme Court of the United States found that, with the added interpretation, the challenged language provided sufficient guidance to the sentencer. *Id.* at 655, 110 S.Ct. 3047.

The Supreme Court added:

> Walton nevertheless contends that the heinous, cruel, or depraved factor has been applied in an arbitrary manner and, as applied, does not distinguish his case from cases in which the death sentence has not been imposed. In effect Walton challenges the proportionality review of the Arizona Supreme Court as erroneous and asks us to overturn it. This we decline to do, for we have just concluded that the challenged factor has been construed by the Arizona courts in a manner that furnishes sufficient guidance to the sentencer. This being so, proportionality review is not constitutionally required, and we "lawfully may presume that [Walton's] death sentence was not 'wantonly and freakishly' imposed -- and thus that the sentence is not disproportionate within any recognized meaning of the Eighth Amendment." *McCleskey v. Kemp*, 481 U.S. 279, 306, 308, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Pulley v. Harris*, 465 U.S. 37, 43, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Further more, the Arizona Supreme Court plainly undertook its proportionality review in good faith and found that Walton's sentence was proportional to the sentences imposed in cases similar to his. The Constitution does not require us to look behind that conclusion.

Id. at 656-657, 110 S.Ct. 3047.

In other words, proportionality review is not an adversarial proceeding independent of the sentencing and appeal process. The standard in such an instance is that the sentencer, whether a jury or judge, must have sufficient guidance (statutory or case law) so that the death penalty is not wantonly or freakishly imposed. This being the case, the defendant does not have a right to have a federal court examine the state courts' decision on proportionality review.

Banks argues that he has a "liberty interest" which is not protected because the process of proportionality review is not adversarial, i.e. he did not have the opportunity to challenge or provide input into the decision of the Supreme Court of Pennsylvania. The Supreme Court rejected this argument in *Banks II*. It pointed out that its review is conducted pursuant to its decision in *Commonwealth v. Frey*, 504 Pa. 428, 475 A.2d 700, *cert. denied*, 469 U.S. 963, 105 S.Ct. 360, 83 L.Ed.2d 296 (1984).[19] *Banks II* at 474. The fact that the opinion gives a reasonable construction to the language is consistent with *Walton* and rebuts any contention that the statute itself gives insufficient guidance.

(Continued)

has been repealed. Act 28, Pub.L. 293, No. 28, § 1 (June 25, 1997), immediately effective. *See also Commonwealth v. Chester*, 1999 WL 419717, at *14 n. 16 (Pa. June 24, 1999).

[19] This is the same case as reviewed by the Third Circuit in *Frey v. Fulcomer*. *See* p. 36-37 and n. 17, above.

The Supreme Court also pointed out that the information on which it relied in conducting proportionality review is available at no cost to the public from the Administrative Office of Pennsylvania Courts. Thus, a capital defendant may obtain the information and, if necessary, investigate its accuracy. *Id.* A challenge to the accuracy of such information can be made to the Supreme Court on direct appeal or in a PCRA petition. Banks, for instance, raised his due process argument in his first PCRA petition, as reflected in the opinion. However, as noted by the Supreme Court, he pointed to no actual deficiency or inaccuracy in that information, nor that he was precluded from obtaining or investigating it. As we stated previously:

> In other words, Banks chose to argue the theory that if a deficiency or inaccuracy existed, he had no way to correct it, yet pointed to absolutely no deficiencies or inaccuracies. A theoretical deprivation is not a basis for habeas relief. Moreover, the opinion indicates that such a challenge may be made in the context of a petition for post-conviction relief.

Banks IV at 1175.[20]

We also reiterate what we stated previously regarding Banks' argument concerning the vagueness of the phrase "similar cases" for purposes of proportionality review: the phrase is ordinary English, not a term of art. No further

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[20] Since avenues of relief are available in the context of the ordinary criminal proceedings, we conclude that there is no procedural due process deprivation. We therefore do not address the concerns raised as *obiter dicta* by the Third Circuit in a footnote in *Frey*. *See id.* at n. 7.

clarification of the term is necessary to satisfy the Due Process Clause.

Banks is not entitled to habeas relief on his claim numbered (10).

X. CONCLUSION

We find no basis for the granting of relief under either of the conditions set forth in 28 U.S.C. § 2254(d), and Banks' petition for a writ of habeas corpus will be denied.

We are required to determine whether Banks has made a substantial showing of the denial of a constitutional right and, if so, to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed.R.App.P. 22(b)(1); *United States v. Eyer*, 113 F.3d 470 (3d Cir. 1997). If the Third Circuit determines that we have erred in applying AEDPA to Banks' claim relating to the jury instructions, verdict slip, and jury poll, then we would be constrained by the Third Circuit's opinion in *Frey* to conclude that Banks is entitled to a writ of habeas corpus. We have concluded that the verb tenses used in AEDPA indicate that the state court's holding must contravene Supreme Court precedent existing at the time of the holding. We cannot say conclusively that what seems to be plain language in a statute will govern the Third Circuit's conclusion as to the applicable time period. *See, e.g., Gibbs v. Roman*, 116 F.3d 83, 86 (3d Cir. 1997) (prisoner requesting leave to proceed without prepayment of fees under 28 U.S.C. § 1915 must allege that he or she was under imminent danger of serious physical injury at time of incident of which prisoner complains, and not at time of filing of complaint, despite statutory language that action may not be brought without prepayment of fees unless prisoner "*is* " under

imminent danger of serious physical injury[21]). *But see Banos v. O'Guin*, 144 F.3d 883 (5th Cir. 1998) (per curiam; proper focus is on time suit filed in district court, time of notice of appeal, or time of motion to proceed *in forma pauperis*); *Ashley v. Dilworth*, 147 F.3d 715 (8th Cir. 1998) (focus is on time of "filing"). We therefore will issue a certificate of appealability based on this issue.

An order consistent with this memorandum will issue.

ORDER

For the reasons stated in the accompanying memorandum, **IT IS ORDERED THAT**:

1. The petition for a writ of habeas corpus (record document no. 1) filed by petitioner George E. Banks is denied.

2. Banks' motion (record document no. 23) to amend the petition for a writ of habeas corpus is denied.

3. We certify pursuant to 28 U.S.C. § 2253(c); Fed. R.App.P. 22(b), that Banks has made a substantial showing of the denial of a constitutional right, specifically on the issue of whether the Third Circuit's opinion in *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997), *cert. denied*, 524 U.S. 911, 118 S.Ct. 2076, 141 L.Ed.2d 151 (1998), controls our consideration of Banks' petition and therefore requires issuance of the writ of habeas corpus.

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[21] In other words, "is" means "was" or, to quote a statement which has been the subject of considerable public debate in recent months, "It depends on what your definition of 'is' is."

4. The stay of execution issued by this court shall remain in effect pending further order of court.

COURT'S APPENDIX I

September 24 & 25, 1982: Shootings and stand-off with police

February 28, 1983: Preliminary competency hearing

March 14, 1983: Competency hearing

May 6, 1983: Competency hearing

June 21, 1983: Banks found guilty by jury

June 22, 1983: Jury returns sentencing phase verdict of death

October 17, 1985: Post-trial motions denied

November 22, 1985: Formal sentence imposed by Court of Common Pleas

February 13, 1987: Pennsylvania Supreme Court affirms judgment of conviction and sentence (*Banks I*)

May 28, 1987: Pennsylvania Supreme Court denies reargument

October 5, 1987: U.S. Supreme Court denies *certiorari*

September 8, 1993: PCRA petition denied

March 27, 1995: Denial of PCRA petition affirmed by Pennsylvania Supreme Court (*Banks II*)

October 2, 1995: U.S. Supreme Court denies *certiorari*

February 15, 1996: Death warrant signed

February 22, 1996: District Court stays execution

March 22, 1996: Petition for writ of habeas corpus filed in District Court

May 28, 1996: Petition found not mixed, unexhausted claims dismissed by District Court (*Banks III*)

August 30, 1996: Petition denied (*Banks IV*)

January 14, 1997: Second PCRA petition filed in Court of Common Pleas

September 19, 1997: Denial of petition for writ of habeas corpus reversed by Third Circuit (*Banks V*)

March 2, 1999: Denial of second PCRA petition affirmed by Supreme Court of Pennsylvania (*Banks VI*)

March 9, 1999: Second execution warrant signed

March 22, 1999: Petition for writ of habeas corpus filed in District Court

March 26, 1999: Execution stayed by District Court

May 7, 1999: Four claims dismissed by District Court as procedurally barred (*Banks VII*)

EXCERPT FROM RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS FILED AT NO. 4:CV-99-0438 (U.S.D.C.M.D. PA.)

B. The Trial Court's Instructions during the Penalty Phase and the Verdict Form Utilized by the Trial Court did not Violate Banks' Constitutional Rights by Improperly Suggesting that Jurors had to Unanimously Agree on Mitigating Circumstances.

Banks also argues that the trial court's instructions during the penalty phase and the verdict form utilized by the trial court violated the principles announced by the United States Supreme Court in *Mills v. Maryland*, 486 U.S. 367, 108 S. Ct. 1860 (1988). More specifically, Banks argues that the jury instruction and the verdict form violated *Mills* by erroneously requiring the jury to unanimously agree on the existence of any mitigating circumstance before each juror could use that circumstance in determining whether Banks should be sentenced to death or life imprisonment. (Brief of Petitioner at p.9). *See Banks III*, 939 F.Supp. at 1174; *Banks II*, 656 A.2d at 470. Thus, Banks is not entitled to relief.

First, Banks' reliance on *Mills* and its progeny is misplaced. *Mills* does not apply to Banks' case because it was not decided until after his conviction and sentence became final.[1] This is important because the Pennsylvania Supreme Court and other district courts have held that *Mills* does not apply retroactively. Moreover, even if *Mills* applied to the instant case, the trial court did not commit a *Mills*

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[1] Banks' conviction and judgment of sentence became final by the conclusion of direct review on October 5, 1987.

violation. Therefore, Banks' request for federal habeas relief must be denied.

In *Mills* the United States Supreme Court declared that a Maryland death penalty statute was unconstitutional because the trial court's statutory instructions in conjunction with the verdict form required jurors to find mitigating factors unanimously. *Mills*, 486 U.S. at 367, 108 S. Ct. at 1860. The Court reasoned that if a jury was required to find mitigating circumstances unanimously, individual jurors would be precluded from considering mitigating circumstances not found unanimously and would thus be precluded from considering "any relevant mitigating evidence." *Id.* at 375, 108 S. Ct. at 1865. *Mills* dictates that an individual juror must not be precluded by statute or instruction from determining what that juror believes to be the mitigating circumstance or circumstances established by the evidence. *See id.*

In making his *Mills* argument, Banks conveniently ignores the retroactive nature of the remedy he is seeking. Despite his oversight, the retroactive application of *Mills* has not gone unchallenged by the Pennsylvania Supreme Court. To the contrary, Pennsylvania's highest court has continually held that *Mills* does not apply retroactively to cases that were final on direct appeal prior to the new rule of law decided in *Mills*.[2] *See Commonwealth v. Cross*, 726 A.2d 333 (Pa. 1999); *Commonwealth v. Peterkin*, 649 A.2d 121 (Pa. 1994).

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[2] As previously indicated, Pennsylvania's resolution of the retroactivity issue is not contrary to, nor does it involve an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). Pennsylvania did not unreasonably conclude that *Mills* should not be applied retroactively to cases that were final

(Continued)

Unfortunately, neither the United States Supreme Court nor the Third Circuit has decided whether *Mills* applies retroactively. The Third Circuit had the opportunity to address this issue in *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997), however, it declined to do so because the respondents did not brief the issue, and thus, it was considered waived. *Frey*, 132 F.3d at 920 n.4.

Absent a definitive pronouncement of the law on this issue from either the United States Supreme Court or the Third Circuit, the United Sates Supreme Court's holding in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989) (plurality opinion) is controlling. Under *Teague*, a case that announces a new rule of law should not be applied retroactively to cases on collateral review unless one or two narrow exceptions is met. *Teague*, 489 U.S. at 310, 109 S. Ct. at 1075. The two exceptions are as follows: (1) "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" and (2) "a new rule should be applied retroactively if it requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'" *Id.* At 307, 109 S. Ct. at 1073 (quoting *Mackey v. United States*, 401 U.S. 667, 692-93, 91 S. Ct. 1160, 1180 (1971)). Applying the *Teague* analysis to *Mills*, it is apparent that *Mills* announced a new rule of law that is

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on direct appeal prior to its pronouncement. Indeed, the same conclusion has been reached by federal courts. *See e.g., Miller v. Lockhart*, 65 F.3d 676, 685-86 (8th Cir. 1995) (holding that *Mills* announced a new rule of law that could not be applied retroactively); *Nethery v. Collins*, 993 F.2d 1154, 1162 (5th Cir. 1993) (same). Hence, Banks is not entitled to habeas corpus relief.

not within the two exceptions permitting retroactive application in habeas corpus petitions. Thus, *Mills* is not applicable in the instant case.

The Third Circuit has recognized that section 2254(d) establishes a more deferential test for habeas corpus petitions and that a district court can only grant relief when the state court's decision "reflects 'an unreasonable application of the law.'" *Berryman v. Morton*, 100 F.3d 1089, 1103-04 (3d Cir. 1996) (quoting *Lindh v. Murphy*, 96 F.3d 856, 869 (7th Cir. 1986)). Moreover, "the state court decision must stand unless it is not debatable among reasonable jurists that the result of which the petitioner complains is incorrect." *Neelley v. Nagle*, 138 F.3d 917, 924-25 (11th Cir. 1998). The Pennsylvania state court's ruling that *Mills* should not be applied retroactively is not an unreasonable application of the law, especially since other circuits have also ruled that it is a new rule of law and should not be applied retroactively. Clearly, the retroactive application of *Mills* is debatable among reasonable jurists and the state court decision must stand.

As the state court's finding that *Mills* does not apply retroactively is a reasonable interpretation of existing law, it should not be disturbed. Nevertheless, even if this Court finds *Mills* should apply retroactively, it must still deny relief. The trial court's instructions and verdict slip were proper. There was no *Mills* violation.

Banks quotes portions of the charge and relies on *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997), in arguing that a *Mills* violation occurred. In his recitation of the trial court's charge, however, he eliminates critical portions of the instruction which are contrary to his assertion. When the

charge is read in its entirety, it is apparent that *Frey* is distinguishable and that no *Mills* violation occurred.

First, the trial court made it clear that the unanimity required was in the ultimate conclusion and not in the interim findings leading to that conclusion. As the trial court instructed:

> Remember that you are not merely recommending a punishment. The verdict you return will actually fix the punishment at death or life imprisonment on each Information. Remember, again, your verdict in each case must be unanimous. It cannot be reached by a majority vote or by any percentage. It must be the verdict of each and every one of you.

(N.T. 2321-22). The trial court then made it clear that unanimity was not when considering potential mitigating circumstances as follows:

> Remember, under the law of this Commonwealth, your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstance, ***or if you unanimously find one or more aggravating circumstances which then outweigh any mitigating circumstances.***

(N.T. 2322). Worded in this fashion, (i.e., "or if you unanimously find one ore more aggravating circumstances which then outweigh any mitigating circumstances") there is not "a reasonable likelihood that the jury . . . applied the challenged instruction in way that prevents the consideration of constitutionally relevant evidence." *See Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 1197-98 (1990). The reasonable likelihood that the entire jury applied the instruction in

an improper manner is further diminished when one considers that the trial court continually discussed the individual mitigating circumstances without ever mentioning the words "unanimous," "unanimously" or "unanimity." (N.T. 2290, 2318-21, 2326-27). Clearly, when the instruction is read in its entirety, the trial court's instructions on unanimity referenced the verdict and not the mitigating circumstances. As such, the charge more closely mirrors the instruction in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991), and *Frey*[3] is distinguishable.

The trial court's instructions did not express a need for unanimity in determining the existence of mitigating circumstances. The trial court did not say that all of the jury's findings on which the verdict was based had to be unanimous. It simply and clearly said that the ultimate "verdict" had to be unanimous. (N.T. 2321-22). Individual jurors were free to weigh whatever mitigating circumstances they perceived, regardless of whether the other jurors agreed that those circumstances were established by the evidence. As a result, there was no *Mills* violation with regard to the jury instructions. Consequently, the state court's decision was not contrary to, or an unreasonable application of, clearly established Federal law and Banks is not entitled to the requested relief. 28 U.S.C. § 2254(d)(1).

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[3] *Frey*, itself, announced and applied a new rule of law in a habeas corpus case in contravention of the holding in *Teague v. Lane*, *supra*, and its progeny. Accordingly, the Third Circuit ruling in *Frey* may not be applied to Banks' habeas corpus petition. Further, because Frey's habeas corpus petition was filed before April 24, 1996, its resolution was not governed by the more deferential standard of review established by the AEDPA.

Likewise, the verdict slip was neither ambiguous nor improper. For this reason, both the Pennsylvania Supreme Court and this Court determined that the charge and the verdict slip were consistent with *Mills*. *See Banks III*, 939 F.Supp. at 1174; *Banks II*, 656 A.2d at 470. Those determinations should not be disturbed.

EXCERPT FROM BRIEF FOR APPELLEES FILED AT NO. 99-9005 (U.S.C.A. 3D CIR.)

II. THE JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA IN REFUSING TO SET ASIDE BANKS' SENTENCE OF DEATH BASED ON BANKS' CHALLENGE TO THE JURY INSTRUCTIONS AND VERDICT FORM WAS NOT CONTRARY TO, NOR DID IT INVOLVE AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES, WITHIN THE MEANING OF 28 U.S.C. § 2254(d)(1).

Banks also argues that the trial court's instructions during the penalty phase and the verdict form utilized by the trial court violated the principles announced by the United States Supreme Court in *Mills v. Maryland*, 486 U.S. 367, 108 S. Ct. 1860 (1988).[1] More specifically, Banks argues that the jury instruction and the verdict form violated *Mills*

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[1] In *Mills*, the United States Supreme Court declared that a Maryland death penalty statute was unconstitutional because the trial court's statutory instructions in conjunction with the verdict form required jurors to find mitigating factors unanimously. *Mills*, 486 U.S. at 367, 108 S. Ct. at 1860. The Court reasoned that if a jury was required to find mitigating circumstances unanimously, individual jurors would be precluded from considering mitigating circumstances not found unanimously and would thus be precluded from considering "any relevant mitigating evidence." *Id.* At 375, 108 S. Ct. at 1865. *Mills* dictates that an individual juror must not be precluded by statute or instruction from determining what that juror believes to be the mitigating circumstance or circumstances established by the evidence. *See id.*

by erroneously requiring the jury to unanimously agree on the existence of any mitigating circumstance before each juror could use that circumstance in determining whether Banks should be sentenced to death or life imprisonment. In making his *Mills* argument, Banks conveniently ignores the retroactive nature of the remedy he is seeking and the fact that the decision of the Supreme Court of Pennsylvania was neither contrary to, nor involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. When these factors are taken into account, it is apparent that Banks' argument is meritless and that he is not entitled to federal habeas corpus relief.[2]

A. Mills Should Not Be Applied Retroactively.

Banks was convicted on June 21, 1983. *See Banks I*, 521 A.2d at 3. His conviction and sentence became final on October 5, [1987], when the Supreme Court of the United States denied his petition for writ of certiorari following his direct appeal. *See generally Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) ("A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state court has been exhausted and the time for filing a petition for writ of certiorari has elapsed or a timely petition has been finally denied."). *Mills* was not decided until June 6, 1988. Thus, Banks was convicted five (5) years before *Mills* was decided and his state conviction and sentence became final eight (8) months before *Mills* was decided. This is significant because the Supreme Court of Pennsylvania has consistently held that *Mills* does not apply

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[2] The state court and the District Court have similarly determined that Banks' claim is meritless. *See Banks VII*, 63 F.Supp.2d at 543-44; *Banks II*, 656 A.2d at 470.

retroactively to cases that were final on direct appeal prior to the new rule of law decided in *Mills*. *See Commonwealth v. Cross*, 726 A.2d 333 (Pa. 1999); *Commonwealth v. Peterkin*, 649 A.2d 121 (Pa. 1994). In so ruling on the retroactivity issue, Pennsylvania's highest court has not rendered a decision that is contrary to clearly established Federal law, as determined by the Supreme Court of the United States. Indeed, to date, there has been no decision by the Supreme Court ruling on the retroactivity of *Mills*. As a result, the Pennsylvania Supreme Court's decision cannot be viewed as being "'diametrically different,' 'opposite in character or nature,' or 'mutually opposed'" to a controlling ruling on this issue by the Supreme Court of the United States. *Williams*, ___ U.S. ___, 120 S. Ct. at 1519.

Nor does the state court's decision on this issue constitute an unreasonable application of clearly established Federal law as reflected in the decisions of the Supreme Court. To the contrary, the Supreme Court's decisions in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989) (plurality opinion), and in *O'Dell v. Netherland*, 521 U.S. 151 (1997), where it has most recently addressed the retroactivity issue, embody the relevant principles of Federal law which are clearly established to date. As both of those cases indicate, the first thing which must be resolved in deciding a retroactivity issue is whether the rule announced in the decision under review is "new." If it is, as *Teague* indicates, the rule should not be applied retroactively to cases on collateral review unless one of two narrow exceptions is met. *Teague*, 489 U.S. at 310, 109 S. Ct. at 1075. The two exceptions are as follows: (1) "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe;'" and (2) "a new rule should be applied retroactively if it requires the observance of 'those procedures that .

. . are implicit in the concept of ordered liberty.'" *Id.* at 307, 109 S. Ct. at 1073 (quoting *Mackey v. United States*, 401 U.S. 667, 692-93, 91 S. Ct. 1160, 1180 (1971)). Applying the *Teague* analysis to *Mills*, it is apparent that *Mills* announced a new rule of law[3] that is not within the two exceptions permitting retroactive application in habeas corpus petitions.[4] Thus, the Supreme Court of Pennsylvania

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[3] In *O'Dell*, it was explained that the essential question in determining whether a ruling was "new" is whether "a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution." *O'Dell*, 521 U.S. at 156-57. Given the state of the law which existed at the time Banks' conviction became final, the state court would, by no means, have felt compelled to conclude that the rule *Mills* announced was Constitutionally-mandated. Then-existing law concerning mitigating circumstances, which consisted of the decisions in *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), dealt with very different questions than *Mills*, namely, a capital defendant's right to present mitigating evidence of his choice, and to have it considered by the sentencing entity. Nothing is either case, or any other controlling precedent, addressed the unanimity issue directly or even indirectly. Viewed from the appropriate historical perspective, it is plain that the notion of non-unanimity of the jury on the question of mitigating circumstances was new.

[4] Plainly, it is not covered by the first exception which involves rules which place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 307, 109 S. Ct. at 1073. And as for the second exception, which pertains to rules which are considered to be of "watershed" nature, the action of the Supreme Court of Pennsylvania cannot be said to be contrary to, or an unreasonable application of, Supreme Court precedent.

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has properly concluded that *Mills* is not retroactively applicable.

In sum, the Supreme Court of Pennsylvania's decision that *Mills* announced a new rule which could not be applied retroactively is in accord with the principles announced in *Teague* and *O'Dell*. The Supreme Court of Pennsylvania's determination as well as the opinions in *Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995), and *Nethery v. Collins*, 993 F.2d 1154 (5th Cir. 1993), illustrate that this conclusion is well within the range of reasonable results that might flow from an application of the teachings of the Supreme Court of the United States on this point. Nor is there a problem with the state court refusing to apply *Mills* retroactively. That action would be wrong only if the new rule announced in *Mills* fits within one of the two exceptions to the general rule of non-retroactivity identified in *Teague*. As the new rule announced in *Mills* does not fit within one of the *Teague* exceptions and no Supreme Court opinion suggests a contrary result, the Supreme Court of Pennsylvania's decision on the *M ills* retroactivity issue is not contrary to, or an unreasonable application of Supreme Court precedent and Banks cannot meet the threshold requirement now contained in section 2254(d)(1) for seeking federal habeas corpus relief.

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Once again, there is no decision by the Supreme Court holding that *Mills* is of such significant statute. Indeed, given the Supreme Court's decision in *O'Dell*, it cannot seriously be suggested that *Mills* should be treated as a "watershed" ruling or that any court refusing to treat *Mills* in such a manner has unreasonably applied Supreme Court precedent.

B. The Trial Court's Instruction and Verdict Slip Were Proper.

Alternatively, even if this Court determines that *Mills* should apply retroactively, it must still deny relief. Clearly, when the charge is read in its entirety, it is apparent that the court's references to unanimity concern the verdict, not mitigating circumstances. Likewise, the verdict slip was neither ambiguous nor improper. As the trial court's instruction and verdict slip were proper, there was no *Mills* violation.

Banks quotes portions of the charge and relies on *Frey v. Fulcomer*, 132 F.3d 916 (3rd Cir. 1997), in arguing that a *Mills* violation occurred. In his recitation of the trial court's charge, however, he eliminates critical portions of the instruction which are contrary to his assertion.[5] When the charge is read in its entirety, it is apparent that *Frey* is distinguishable and that no *Mills* violation occurred.

First, the trial court made it clear that the unanimity required was in the ultimate conclusion and not in the interim findings leading to that conclusion. As the trial court instructed:

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[5] For example, in one instance Banks tries to draw a parallel between two sentences contained in the charge while omitting the seven pages of instruction that separate the two sentences. (Brief of Appellant at p.25). When read in context, the quoted sentences could not lead a reasonable juror to conclude that unanimity was required with regard to their findings of mitigating circumstances. (*See* Appendix at pp. 65,73). Such a convoluted attempt to take the trial court's charge out of context demonstrates the desperate nature of Banks' argument and illustrates how far out-of-context the charge must be read before even he can manufacture "support" for his argument.

> Reme nber that you are not merely recommending a punishment. The verdict you return will actually fix the punishment at death or life imprisonment on each Information. Remember, again, your verdict in each case must be unanimous. It cannot be reached by a majority vote or by any percentage. It must be the verdict of each and every one of you.

(Appendix at pp. 71-72). The trial court then made it clear that unanimity was not required when considering potential mitigating circumstances as follows:

> Remember, under the law of this Commonwealth, your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstance, **or if you unanimously find one or more aggravating circumstances which then outweigh any mitigating circumstances.**

(Appendix at p. 72) (emphasis supplied). Worded in this fashion (i.e., "or if you unanimously find one or more aggravating circumstances which then outweigh **any** mitigating circumstances") there is not "a reasonable likelihood that the jury . . . applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *See Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 1197-98 (1990). The reasonable likelihood that the entire jury applied the instruction in an improper manner is further diminished when one considers that the trial court continually discussed the individual mitigating circumstances without ever mentioning the words "unanimous," "unanimously" or "unanimity." (Appendix at pp. 68-77; Supplemental Appendix at p. 48). Clearly, wher he instruction is read in its entirety, the trial court's instr on on unanimity referenced the verdict and not the mitigating circumstances. As such, the

charge more closely mirrors the instruction in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3rd Cir. 1991), and *Frey*[6] is distinguishable.

The trial court's instructions did not express a need for unanimity in determining the existence of mitigating circumstances. The trial court did not say that all of the jury's findings on which the verdict was based had to be unanimous. It simply and clearly said that the ultimate "verdict" had to be unanimous. (Appendix at pp. 65, 68-77). Individual jurors were free to weigh whatever mitigating circumstances they perceived, regardless of whether the other jurors agreed that those circumstances were established by the evidence. As a result, there was no *Mills* violation with regard to the jury instructions.

Likewise, the verdict slip was neither ambiguous nor improper. It clearly did not suggest a need for unanimity when finding mitigating circumstances. As a result, there was also no *Mills* violation with regard to the verdict slip.

Just as with the retroactivity issue, there is no decision of the Supreme Court of the United States to date ruling on a jury charge phrased as the one in this case was or considering a verdict slip worded as the one in this case was. Consequently, the state court decision in this case is not contrary to controlling Supreme Court precedent.

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[6] *Frey*, itself, announced and applied a new rule of law in a habeas corpus case in contravention of the holding in *Teague v. Lane*, *supra*, and its progeny. Further, because Frey's habeas corpus petition was filed before April 24, 1996, its resolution was not governed by the more deferential standard of review established by the AEDPA. Accordingly, the Third Circuit ruling in *Frey* should not be applied to Banks' habeas corpus petition.

Nor, once again, does the decision of the state court evidence an unreasonable application of Supreme Court precedent. As its opinion in this case reflects, the Supreme Court of Pennsylvania correctly identified *Mills* as the lodestar for its decision and the essential problem for which *Mills* says a jury charge must be vetted, i.e., whether the instructions as given may have led the jury to conclude incorrectly that its members had to be unanimous in finding any mitigating circumstance(s). Examining the charge in this case in its entirety, something which it was obliged to do under clearly established Supreme Court authority,[7] the state supreme court concluded it was not flawed. Instead, the state supreme court concluded that when the charge was viewed in its entirety, the language referring to unanimous findings pertained to the ultimate verdict, not any determinations preliminary to it. On the facts of this case, that was well within the range of reasonable conclusions. Certainly, a different court may have viewed it differently. However, as previously discussed, just because a federal habeas court might have reached a different conclusion, or may believe that the state court erred in applying the law, does not justify granting relief to a state prisoner. *Williams*, ___ U.S. at ___ 120 S. Ct. at 1522. The state court's ruling must be contrary to, or an unreasonable application of, clearly established Supreme Court precedent, and that simply is not the case here. To the contrary, because its analysis both identified and employed all of the correct legal principles, and reached a conclusion that could legitimately be reached on the facts of this case, the Supreme Court of Pennsylvania's decision in this case must be accorded deference and afforded a presumption of correctness. *See* 28 U.S.C. § § 2254(d)(1) and 2254(e)(1). More importantly,

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[7] *See Cupp v. Naughton*, 414 U.S. 141 (1973).

when viewed in this manner, the Supreme Court of Pennsylvania's decision provides no basis for relief to Banks.

EXCERPT FROM BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS' PETITION FOR REHEARING EN BANC FILED AT 99-9005 (U.S.C.A. 3D CIR.)

INTEREST OF *AMICUS CURIAE*

The Attorney General is the chief law officer and chief law enforcement officer of the Commonwealth of Pennsylvania. Pa. Const., Art. IV, § 4.1; Commonwealth Attorneys Act, 71 P.S. § 732-206(a). The Attorney General regularly represents respondents in habeas corpus proceedings brought by state prisoners challenging their convictions and sentences in the federal courts pursuant to 28 U.S.C. § 2254. The Attorney General has an abiding interest in seeing that attacks on successful convictions obtained in the courts of Pennsylvania, which have withstood review in the State courts, are properly litigated in the federal courts and that the federal courts exercising their jurisdiction in habeas corpus proceedings properly apply the federal habeas statute as interpreted by the United States Supreme Court. This interest extends to the proper application of cases like *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, which bar, with limited exceptions, application of new constitutional rules of criminal procedure by the federal courts in habeas corpus review to cases that were final on direct appeal in the State system before the new rules were announced.

The opinion of the panel in this case has serious implications for habeas litigation in the circuit in general, and in capital habeas litigation, in particular. The manner in which the panel addressed *Teague* (or failed to address it) will have ramifications in all habeas cases. The specific holding of the panel, invalidating a death sentence based on a perceived violation of *Mills v. Maryland*, 486 U.S. 367 (1988), will

directly impact at least thirty cases in which the Pennsylvania Supreme Court has rejected *Mills* challenges.[1] In most instances, as in this case, the State court addressed the merits of the claim and rejected it, oftentimes with an alternate holding.[2] In some of these cases the Supreme Court said that

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[1] To be sure, the Pennsylvania Supreme Court has found jury instructions or verdict slips which violated the teachings of *Mills* and granted relief. *See, e.g., Commonwealth v. Begley*, 780 A.2d 605 (Pa. 2001) (*Mills* error); *Commonwealth v. Young*, 572 A.2d 1217 (Pa. 1990) (*Mills* error); *Commonwealth v. Billa*, 555 A.2d 835 (Pa. 1989) (*Mills* error; *dicta*).

[2] *See, e.g., Commonwealth v. Kemp*, 753 A.2d 1278 (Pa. 2000) (no *Mills* error); *Commonwealth v. Murphy*, 657 A.2d 927 (Pa. 1995) (no *Mills* error); *Commonwealth v. Hackett*, 627 A.2d 719 (Pa. 1993) (no *Mills* error); *Commonwealth v. Thomas*, 744 A.2d 713 (Pa. 2000) (no *Mills* error; not ineffective for failing to predict change in law); *Commonwealth v. Holloway*, 599 Pa. 258, 739 A.2d 1039 (1999) (not ineffective for failing to predict change in law); *Commonwealth v. Rollins*, 738 A.2d 435 (Pa. 1999) (no *Mills* error); *Commonwealth v. Chester*, 733 a.2d 1242 (Pa. 1999) (no *Mills* error); *Commonwealth v. Breakiron*, 729 A.2d 1088 (Pa. 1999) (no *Mills* error; ineffectiveness not proven); *Commonwealth v. Holland*, 727 A.2d 563 (Pa. 1999) (no *Mills* error); *Commonwealth v. Porter*, 728 A.2d 890 (Pa. 1999) (no *Mills* error; not ineffective for failing to object); *Commonwealth v. Laird*, 726 A.2d 346 (Pa. 1999) (no *Mills* error; not ineffective for failing to object); *Commonwealth v. Blystone*, 725 A.2d 1197 (Pa. 1999) (no *Mills* error; not ineffective for failing to object); *Commonwealth v. Cross*, 726 A.2d 333 (Pa. 1999) (no *Mills* error; *Mills* not retroactive); *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998) (no *Mills* error; not ineffective for failing to object); *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998) (no *Mills* error); *Commonwealth v. Whitney*, 708 A.2d 471 (Pa. 1998) (no *Mills* error; not ineffective for failing to predict change in law; *Mills* not

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Mills was not applicable to cases that were final before the opinion in *Mills* was announced.[3] Some of these cases were final on direct appeal in the State courts before *Mills* was

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retroactive); *Commonwealth v. Jermyn*, 709 A.2d 849 (Pa. 1998) (no *Mills* error; not ineffective for failing to raise issue; *Mills* not retroactive); *Commonwealth v. Henry*, 706 A.2d 313 (Pa. 1997) (no *Mills* error; not ineffective for failing to object); *Commonwealth v. Hardcastle*, 701 A.2d 541 (Pa. 1997) (no *Mills* error; not ineffective for failing to predict change in law; Mills not retroactive); *Commonwealth v. Travaglia*, 661 A.2d 352 (Pa. 1995) (no *Mills* error); *Commonwealth v. Smith*, 650 A.2d 863 (Pa. 1994) (no *Mills* error); *Commonwealth v. Wilson*, 649 A.2d 435 (Pa. 1994) (no *Mills* error); *Commonwealth v. Peterkin*, 649 A.2d 121 (Pa. 1994) (no *Mills* error; not ineffective for failing to object; *Mills* not retroactive); *Commonwealth v. Moore*, 633 A.2d 1119 (Pa. 1993) (no *Mills* error); *Commonwealth v. Young*, 637 A.2d 1313 (Pa. 1993) (no *Mills* error); *Commonwealth v. Marshall*, 633 A.2d 1100 (Pa. 1993) (no *Mills* error; not ineffective for failing to raise issue); *Commonwealth v. Stokes*, 615 A.2d 704 (Pa. 1992) (no *Mills* error); *Commonwealth v. Jones*, 610 A.2d 931 (Pa. 1992) (no *Mills* error); *Commonwealth v. Tilley*, 595 A.2d 575 (Pa. 1991) (no *Mills* error); *Commonwealth v. Jasper*, 587 A.2d 705 (Pa. 1991) ([no] *Mills* error); *Commonwealth v. Williams*, 570 A.2d 75 (Pa. 1990) (no *Mills* error); *Commonwealth v. O'Shea*, 567 A.2d 1023 (Pa. 1989) (no *Mills* error); *Commonwealth v. Frey*, 554 A.2d 27 (Pa. 1989) (no *Mills* error).

[3] *See, e.g., Commonwealth v. Cross, supra* (no *Mills* error; *Mills* not retroactive); *Commonwealth v. Whitney, supra* (no *Mills* error; not ineffective for failing to predict change in law; *Mills* not retroactive); *Commonwealth v. Jermyn, supra* (no *Mills* error; not ineffective for failing to raise issue; *Mills* not retroactive); *Commonwealth v. Hardcastle, supra* (no *Mills* error; not ineffective for failing to predict change in law; *Mills* not retroactive); *Commonwealth v. Peterkin, supra* (no *Mills* error; not ineffective for failing to object; *Mills* not retroactive).

announced.[4] Others were tried before *Mills* but decided on direct appeal after *Mills* was announced.[5] In many of those cases, the *Mills* issue had not been raised and preserved in the trial court and on direct appeal.[6] It was subsequently raised in a collateral proceeding attacking the judgment of sentence in the State courts under the Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. § § 9541 *et seq.*[7]

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[4] *See, e.g., Commonwealth v. Albrecht, supra; Commonwealth v. Whitney, supra; Commonwealth v. Jermyn, supra; Commonwealth v. Travaglia, supra; Commonwealth v. Smith, supra; Commonwealth v. Peterkin, supra; Commonwealth v. Frey, supra.*

[5] *Commonwealth v. Thomas, supra; Commonwealth v. Holloway, supra; Commonwealth v. Rollins, supra; Commonwealth v. Chester, supra; Commonwealth v. Breakiron, supra; Commonwealth v. Porter, supra; Commonwealth v. Laird, supra; Commonwealth v. Blystone, supra; Commonwealth v. Abu-Jamal, supra; Commonwealth v. Henry, supra; Commonwealth v. Hardcastle, supra; Commonwealth v. Wilson, supra; Commonwealth v. Moore, supra; Commonwealth v. Young, supra; Commonwealth v. Marshall, supra; Commonwealth v. Stokes, supra; Commonwealth v. Jones, supra; Commonwealth v. Tilley, supra; Commonwealth v. Jasper, supra; Commonwealth v. Williams, supra; Commonwealth v. O'Shea, supra.*

[6] In some instances, the issue was entertained on direct appeal even though the case was tried before *Mills* was announced. *See, e.g., Commonwealth v. Moore, supra; Commonwealth v. Young, supra; Commonwealth v. Stokes, supra; Commonwealth v. Jones, supra; Commonwealth v. Tilley, supra; Commonwealth v. Jasper, supra; Commonwealth v. Young, supra; Commonwealth v. Williams, supra; Commonwealth v. O'Shea, supra; Commonwealth v. Billa, supra.*

[7] *See, e.g., Commonwealth v. Thomas, supra;*

(Continued)

All of these death-sentenced prisoners whose challenges were rejected by the State Supreme Court will seek relief under the panel's decision.[8] As the Attorney General believes that the panel is in grave error, he files this petition *amicus curiae* in support of Respondents, Appellees herein, urging rehearing *en banc*.

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Commonwealth v. Holloway, supra; Commonwealth v. Rollins, supra; Commonwealth v. Chester, supra; Commonwealth v. Breakiron, supra; Commonwealth v. Porter, supra; Commonwealth v. Laird, supra; Commonwealth v. Blystone, supra; Commonwealth v. Cross, supra; Commonwealth v. Albrecht, supra; Commonwealth v. Abu-Jamal, supra; Commonwealth v. Whitney, supra; Commonwealth v. Jermyn, supra; Commonwealth v. Henry, supra; Commonwealth v. Hardcastle, supra.

[8] Indeed, the Attorney General is already involved in cases before this Court and the district courts where *Mills* claims are pending. *See Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001); *Szuchon v. Lehman*, Nos. 00-9000 & 00-9001 (3d Cir.); *Carpenter v. Horn*, No. 95-9001 (3d Cir.); *Breakiron v. Horn*, No. 00-300 (W.D. Pa.); and *Blystone v. Horn*, No. 99-CV-490 (W.D. Pa.).